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Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

RICHARD E. WILEY, Chairman

ROBERT E. LEE BENJAMIN L. HOOKS

CHARLOTTE T. REID

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FCC 74-185

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF AHB BROADCASTING CORP., LICENSEE OF RADIO STATION KYAL, MCKINNEY, TEX.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted February 21, 1974; Released February 25, 1974)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability dated and mailed on August 29, 1972, to AHB Broadcasting Corporation, the licensee of Radio Station KYAL, McKinney, Texas, and (2) the licensee's reply thereto received October 2, 1972.

2. The Notice of Apparent Liability issued in this proceeding, in the amount of one thousand five hundred dollars ($1,500), was for the following violations which were discovered when the station was inspected on December 16 and 17, 1971:

> Section 73.113(a)(3)(ii) in that during presunrise hours the operators were not always recording the actual common point current. For example, during the period between May 4, 1971, and the date of inspection [except on Sundays], plate volts and plate current indications were typical of presunrise power, but the common point current indication was typical of daytime 5,000 watt operation.[1]
>
> Section 73.52(a) in that the daytime operating power at the time of inspection [December 16, 1971] was in excess of 5% above the licensed power of 5,000 watts. For example, the common point current was 10.9 amps at the time of inspection which renders 5,500 watts by the direct method.
>
> Section 73.113(a)(4)(i) in that the base current indications were not always being entered in the operating log once each day for each mode of operation. For example, see the operating log for November 6, 7, 20, 21, 1971.
>
> Noncompliance with Terms of the Station Authorization in that, according to the terms of the station authorization, field intensity measurements are to be made once each seven days,

[1] Station KYAL is licensed for operation with directional antenna with power of 5,000 watts daytime and has Presunrise Service Authority for operation at 500 watts during presunrise hours.

104-030—74——1

whereas according to the chief operator, measurements were being made once each month.

3. In addition, in regard to violation of Section 73.113(a)(3)(ii), the licensee was notified in the Notice of Apparent Liability that if actual readings of common point current were made, the station was operated in violation of Section 73.87 of the Commission's Rules and the terms of the station license. With regard to violation of Section 73.52(a), the licensee was notified that on December 17, 1971, at 9:30 a.m. the antenna current was 10.8 amps., which would indicate operation in excess of 5 per cent above the licensed power of 5,000 watts. Concerning violations of the terms of the station authorization, the licensee was notified that the logs for the period August 1 to December 16, 1971, indicated that the field intensity at each of the monitoring points was measured on August 12, September 23, October 14, November 12, and December 13, 1971.

4. In response to the Notice of Apparent Liability, licensee replied specifically to each violation and stated in general as to all the violations that it discharged several announcers and its engineer and employed a consulting engineer, that all persons were working under the supervision of the consulting engineer, and that they had been instructed to follow all the Commission's Regulations. Licensee stated that it had gone to a great deal of expense and had made many changes of personnel to assure that there would not be any recurrence of violations and it cited past and current operating losses. Licensee asserted that this forfeiture would greatly hamper its efforts to provide its "rural area with public service", and that the forfeiture is excessive for a station licensed to a city of only 20,000.

5. In regard to the specific violations, licensee acknowledges that "at the time of the inspection on December 16th and 17th, 1971, [it was] in violation of Section 73.113" and "at the time of inspection" it was in violation of Section 73.87 of the Rules. The admission of violation of 73.113, i.e., failure to log actual common point current, leads to the conclusion that the station was being operated at 500 watts during presunrise hours since the entries for plate volts and plate current were typical of operation at 500 watts. On the other hand, the licensee also admits violation of Section 73.87, apparently indicating that the station was being operated at greater than authorized presunrise power, which would appear to be 5,000 watts since the common point current being logged was for 5,000 watts. Licensee's admission of the violations, which were stated in the alternative in the Notice of Apparent Liability, appears inconsistent, and by admitting both it is not clear which rule was violated. Further the admission was only in regard to violations occurring on the days of inspection, and the licensee failed to respond to violations on days preceding the inspection. Under the circumstances, since we cannot determine which alternative licensee elected, we find that within the one year time limitation, i.e., during the period August 29, 1971, through December 15, 1971, the licensee violated Section 73.113(a)(3)(ii) in failing to log actual common point current or violated Section 73.87 of the Rules and the terms of the station license by operating with 5,000 watts during presunrise hours.

6. The licensee acknowledges the violations of Section 73.52(a), and we find that the licensee violated this section of the Rules on December 16 and 17, 1971.

7. Licensee also acknowledges that at the time of inspection, it violated Section 73.113(a)(4)(i). However, the Notice of Apparent Liability specified violations on November 6, 7, 20 and 21, 1971. We find in this instance that the licensee was in violation of Section 73.113 (a)(4)(i) of the Commission's Rules on these four days in November, 1971.

8. Licensee states that it was under the impression that field intensity measurements were only to be made monthly rather than every seven days, and that it was not making measurements every seven days. We find that the licensee violated the terms of its authorization in this regard each week during the period August 29, 1971, to the time of inspection, except for the weeks [2] when measurements were made.

9. The financial condition of the licensee was considered prior to issuance of the Notice of Apparent Liability. Failure to be aware of the Commission's requirements will not excuse a licensee from its obligation to operate the station in compliance with the terms of the authorization and the Commission's Rules. *Empire Broadcasting Corp.*, 25 FCC 2d 68 (1970). Furthermore, licensees will not be excused for violations because corrective action has been taken after the occurrence of the violations. *Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966). Considering the licensee's response and the circumstances in this case, including the licensee's efforts to serve a rural community, we are not persuaded to remit or mitigate the forfeiture.

10. In view of the foregoing, IT IS ORDERED, That AHB Broadcasting Corporation, licensee of Radio Station KYAL, McKinney, Texas, FORFEIT to the United States the sum of one thousand five hundred dollars ($1,500) for repeated violation of the Commission's Rules: Sections 73.52(a), 73.113(a)(3)(ii), 73.113(a)(4)(i), and failure to abide by the terms of the station authorization or alternatively Sections 73.52(a), 73.87, 73.113(a)(4)(i) and failure to abide by the terms of the station authorization. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Federal Communcations Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] Measurements were made on September 23, October 14, November 12 and December 13, 1971.

FCC 74-190

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request of
THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.
Concerning Waiver Involving Sharing Microwave Facilities of Santa Fe Terminal Services, Inc.

FEBRUARY 21, 1974.

The ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,
Chicago, Ill.

(Attention Mr. L. R. Thomas)

GENTLEMEN: The Commission has examined your waiver request to permit you to share your microwave facilities with Santa Fe Terminal Services, Inc., on a non-profit basis.

After careful consideration, the Commission has concluded that it is in the public interest to grant a waiver of Sections 93.351 and 93.357, Part 93, of the Commission's Rules and Regulations. Consequently, the Atchison, Topeka and Santa Fe Railway Company is hereby authorized to furnish microwave communications service to Santa Fe Terminal Services, Inc., its sister subsidiary, on a non-profit basis.

Chairman Burch was absent.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-232

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re CEASE AND DESIST ORDER TO BE DIRECTED AGAINST CABLE TELEVISION CO. OF PUERTO RICO, SAN JUAN, P.R.	CSC-1 PR001

MEMORANDUM OPINION AND ORDER

(Adopted March 7, 1974; Released March 15, 1974)

BY THE COMMISSION:

1. On April 10, 1972, WAPA-TV Broadcasting Corporation, licensee of Station WAPA-TV, San Juan, Puerto Rico, filed a "Request for Order to Show Cause and for Immediate Issuance of Stay" (CSC-1) directed against Cable Television Company of Puerto Rico (Cable Company), operator of a cable television system at San Juan, Puerto Rico, for alleged violation of Section 76.501(a)(2) of the Commission's Rules.[1] On April 17, 1972, Cable Company filed an "Opposition to Request for Order to Show Cause and for Immediate Issuance of Stay." On April 21, 1972, WAPA-TV filed its "Reply to Opposition." On February 19, 1974, Mr. Alfredo de Arellano, Jr., and Mr. Alfredo de Arellano, III filed a contract binding them to sell their respective interests in Cable Company, which give rise to the alleged cross-ownership, by November 30, 1974.

2. San Juan, Puerto Rico, is not an ARB television market. Cable Company operates a twelve-channel system and carries the following signals:

WAPA-TV (Ind.) San Juan, Puerto Rico.
WKAQ-TV (Ind.) San Juan, Puerto Rico.
WIPR-TV (Educ.) San Juan, Puerto Rico.
WRIK-TV (Ind.) Ponce, Puerto Rico.
WKBM-TV (Ind.) Caguas, Puerto Rico.

Station WORA-TV, Mayaguez, Puerto Rico, places a predicted Grade B contour over San Juan, Puerto Rico. Station WRIK-TV, Ponce, Puerto Rico, places a predicted principal community contour over San Juan, Puerto Rico.

3. On June 25, 1970, the Public Service Commission of Puerto Rico offered a Certificate of Public Convenience and Necessity to Cable Television Corporation of Puerto Rico (Cable Corporation). Cable Corporation did not accept the offer of the Certificate, however, until

[1] Also pending are Cable Company's application for a Certificate of Compliance (CAC-122) and applications for construction permits in the Cable Television Relay Service (CPCAR-331, 332). We do not now pass on these applications.

September 8, 1970—several months after the effective date of Section 76.501(b) of the Commission's Rules.[2] On December 28, 1971, Cable Corporation secured the Public Service Commission's approval to transfer its Certificate to Cable Company.

4. This case presents two alleged violations of Section 76.501(a) of the Commission's Rules, which prohibits a cable television system from carrying broadcast signals if it "directly or indirectly owns, operates, controls, or has an interest in . . ." a television broadcast station which places a predicted Grade B contour over its "service area."[3] Mr. Alfredo de Arellano Jr. and his son, Mr. Alfredo de Arellano III, each own 22.525 percent of Cable Corporation. In addition, they each have interests in television stations which place predicted Grade B or better contours over San Juan.

5. The details of the de Arellano cable holdings are somewhat complicated. Mr. Alfredo de Arellano, Jr. owns 63.6 percent of Radio Americas Corporation, which in turn owns 22.525 percent of Cable Corporation. Similarly, Mr. Alfredo de Arellano III owns the Arellano Enterprise Fund, which in turn owns 22.525 percent of Cable Corporation. The de Arellano interests in Cable Company arise from the fact that Cable Corporation is a forty percent owner and limited partner in Cable Company. KCA Cable TV Industries, Inc. owns the rest of and is the general partner in Cable Company. Accordingly, Mr. de Arellano Jr.'s interest runs from Radio Americas to Cable Corporation to Cable Company; Mr. de Arellano III's interest runs from Arellano Enterprise Fund to Cable Corporation to Cable Company.

6. The de Arellano broadcast holdings are also somewhat complex. As noted in Paragraph 5, Mr. de Arellano Jr. controls Radio Americas. In turn, Radio Americas owns Quality Telecasting Corporation, licensee of Station WORA–TV, Mayaguez, Puerto Rico, which places a predicted Grade B contour over San Juan.[4] Similarly, Mr. de Arellano III owns 19.9 percent of Station WRIK–TV, Ponce, Puerto Rico, which places a predicted principal community contour over San Juan. Mr. de Arellano III's interest was placed in a trust. In addition, Mr. de Arellano III also is an officer, director, and minority shareholder in WORA–TV, his father's station. Accordingly, Mr. de Arellano has an interest in one station which places a predicted Grade B contour over San Juan—WORA–TV—while Mr. de Arellano III has interests in two—WORA–TV and WRIK–TV.

---

[2] Section 76.501(b) provides:

"The provisions of paragraph (a) of this section are not effective until August 10, 1975, as to ownership interests proscribed herein if such interests were in existence on or before July 1, 1970 (e.g., if a franchise were in existence on or before July 1, 1970): Provided, however, that the provisions of paragraph (a) of this section are effective on August 10, 1970, as to such interests acquired after July 1, 1970.

"Accordingly, Cable Company does not have the normal grace period until August 10, 1975, to come into compliance, since it did not have a cross-interest before July 1, 1970, under Section 76.501(b) if Cable Corporation received its Certificate on September 8, 1970."

[3] Section 76.501(a)(2) provides: "No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in: (2) A television broadcast station whose predicted Grade B contour, computed in accordance with § 73.684 of this chapter, overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers);"

[4] In addition, Mr. de Arellano Jr. also controls through Radio Americas the following radio stations: WORA, Mayaguez; WQBS and WQBS–FM, San Juan; and WPRP and WPRP–FM, Ponce.

7. Mr. de Arellano Jr. and Mr. de Arellano III thus have interests in co-located television stations and cable television systems, and their interests appear to have arisen after the effective date of Section 76.501 (a) (2). Cable Company argues, however, that these cross-interests do not constitute violations of Section 76.501(a) (2) on a number of grounds. First, Cable Company asserts that the de Arellano interests in WORA–TV do not violate the rule, since WORA–TV does not place an actual Grade B contour over San Juan. Second, it maintains that Alfredo de Arellano III's 19.9 percent ownership of WRIK–TV is not relevant, since it is subject to a trust which we approved in 1971 under our anti-duopoly rules. Third, Cable Company asserts that divestiture is not required until August 10, 1975, on the ground that Cable Corporation acquired its franchise before the effective date of Section 76.501(a) (2).

8. This case thus presents two *prima facie* violations of Section 76.501(a) (2), which are sufficiently complex to require a full evidentiary hearing pursuant to an order to show cause. Indeed, KCA, Mr. de Arellano Jr., and Mr. de Arellano III, have been extremely dilatory in supplying the Commission with appropriate information to resolve the proceeding—a fact of which we take due note.

9. Nevertheless, we decline to issue the requested Order to Show Cause. As noted above, KCA and the de Arellanos recently filed with the Commission a contract requiring full divestiture of the de Arellano interests in Cable Company.[5] Accordingly, we find that issuance of an Order to Show Cause and designation of a hearing would be inappropriate and inconsistent with the public interest. By the time that the hearing procedure could develop any meaningful information, the divestiture already would have occurred pursuant to the contract. We will scrutinize the parties' adherence to their contract, of course, and take appropriate remedial action in the event of a breach. Accordingly we exercise our discretion in denying the requested Order to Show Cause. See, e.g., *Orange Cablevision, Inc.*, FCC 73–1140, 43 FCC 2d 582; *C. J. Community Services* v. *Federal Communications Commission*, 246 F. 2d 660 (D.C. Cir. 1967).

In view of the foregoing, the Commission finds that the issuance of the requested Order to Show Cause would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Request for Order to Show Cause and for Immediate Issuance of Stay" filed April 10, 1972, by WAPA–TV Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[5] The contract is fully executed, and provides, *inter alia*, that "KCA Cable hereby agrees to purchase and by their acceptances noted herein below Radio Americas and Arellano Enterprise each agrees to sell on November 30, 1974 their respective 22.525% interests in Cable Television Corp. or their respective 6.7575% interests in Cable Television Company if Cable Television Corp. has been dissolved."

FCC 74–199

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of CAPITOL DISTRICT BETTER T.V., INC., VILLAGE OF COLONIE, N.Y. CAPITOL DISTRICT BETTER T.V., INC., TOWN OF COLONIE, N.Y. For Certificates of Compliance	CAC–75 NY335 CAC–76 NY336

MEMORANDUM OPINION AND ORDER

(Adopted February 27, 1974; Released March 7, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. On March 31, 1972, Capitol District Better T.V., Inc., filed the above-captioned applications for certificates of compliance to commence cable television service at Village of Colonie and Town of Colonie, New York, communities located in the Albany-Schenectady-Troy television market (#34). Capitol requested, in addition to the distant independent signal of WSBK–TV, Boston, Massachusetts, a waiver of the "leapfrogging" provisions of Section 76.61(b)(2) of the Commission's Rules to import the distant independent signals of Television Broadcast Stations WOR–TV and WPIX, both New York, New York. The applications were opposed by Albany Television, Inc., licensee of Television Broadcast Station WTEN, Albany, New York, and by Sonderling Broadcasting Corporation, licensee of Station WAST, Albany, New York. In addition, Faith Center, licensee of Station WHCT–TV, Hartford, Connecticut, filed a "Petition for Carriage." Thereafter, Capitol amended its applications to request also carriage of a fourth distant independent signal, WHCT–TV.

2. On January 17, 1973, in *Capitol District Better T.V., Inc.*, FCC 73–49, 39 FCC 2d 13 (1973), the Commission denied carriage of WOR–TV and WPIX and authorized carriage of the following television broadcast stations:

WAST (ABC, Channel 13) Albany, New York.
WTEN (CBS, Channel 10) Albany, New York.
WRGB (NBC, Channel 6) Schenectady, New York.
WMHT (Educ., Channel 17) Schenectady, New York.
WSBK–TV (Ind., Channel 38) Boston, Massachusetts.
WHCT–TV (Ind., Channel 18) Hartford, Connecticut.

and one UHF television station located within 200 air miles of the communities, which Capitol might select. Certificates of compliance were to be issued when Capitol advised the Commission of its choice.

On November 9, 1973, in *Commission on Cable Television of the State of New York*, FCC 73–1148, 43 FCC 2d 826 (1973), *recons. denied*, FCC 74–99, —— FCC 2d —— (1974), the Commission granted special relief to allow cable television systems in the "Capital District" (the communities within the Commission's definition of the Albany-Schenectady-Troy television market) to carry two independent television signals (WOR–TV and WPIX) from New York City, notwithstanding the leapfrogging restrictions of Section 76.61(b)(2) of the Rules, on condition that the affected cable television systems "refrain from deleting news and public affairs programs of the New York City stations pursuant to the provisions of Section 76.61(b)(2)(ii)." In addition, the Commission stated that its decision was dispositive of leapfrog issues in the Capital District and objections on these grounds would not be dealt with in the certificating process.[1]

3. On January 2, 1974, by letter, Capitol requested that the Commission issue certificates of compliance, authorizing it to carry, in addition to the four in-market stations, the distant independent signals of WOR–TV, WPIX, and WHCT–TV.[2] This request is unopposed. Capitol states that since the original decision in *Capitol District*, it has not selected a third independent signal, and certificates of compliance have never been issued. It notes that pursuant to the Commission's decision in *Commission on Cable Television*, the Cable Television Bureau has been issuing certificates of compliance to cable systems in the heart of the Capital District which authorize the carriage of Stations WOR–TV and WPIX, including a certificate to Schenectady Cablevision, Inc., which also holds a franchise for the Town of Colonie. Capital argues that while it was previously denied authority to carry WOR–TV and WPIX, in view of the Commission's recent actions, it is now fully entitled to carry these two stations and WHCT–TV in both the Town and Village of Colonie. We must agree. Since our original action in *Capitol District*, our views on this matter have changed, and carriage of the two New York City independents is now fully consistent with existing precedent.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications, as amended, would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the applications for certificates of compliance (CAC–75, 76), as amended, filed by Capitol District Better T.V., Inc., ARE GRANTED, subject to the condition expressed in paragraph 2 above, and the appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

---

[1] *Commission on Cable Television, supra*, at 833, n. 17.
[2] Capitol no longer seeks carriage of Station WSBK–TV.

FCC 74R-99

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
WILLIAM A. CHAPMAN AND GEORGE K. CHAPMAN, D.B.A. CHAPMAN RADIO & TELEVISION CO., HOMEWOOD, ALA.	Docket No. 15461 File No. BPCT-3282
BIRMINGHAM BROADCASTING CO., BIRMINGHAM, ALA.	Docket No. 16761 File No. BPCT-3707
For Construction Permit for a New Television Broadcast Station	

MEMORANDUM OPINION AND ORDER

(Adopted March 18, 1974; Released March 19, 1974)

BY THE REVIEW BOARD:

1. This proceeding involves the applications of Chapman Radio and Television Company (Chapman), and Birmingham Broadcasting Company (BBC), for authorization to construct a new UHF television broadcast station. On March 12, 1974, the Administrative Law Judge released a second supplemental Initial Decision in which he found BBC qualified to own and operate a television station in Birmingham, Alabama. (FCC 74D-19) This most recent remand was occasioned by Memorandum Opinion and Order, 38 FCC 2d 871, 26 RR 2d 395 (1973), in which the Review Board enlarged the issues to determine whether BBC possesses the requisite character qualifications to be a Commission licensee in light of the criminal conviction of one of its principals, Oscar E. Hyde.[1] Presently before the Review Board is a petition to declare Birmingham Broadcasting Company disqualified, filed on January 24, 1974, by Chapman.[2] In this petition Chapman alleges that BBC is patently disqualified on both character and financial grounds.

2. Chapman requests the Review Board to declare Birmingham Broadcasting Company summarily "unqualified financially and with respect to its character" and, consequently, to dismiss its application. In support of its request, petitioner argues: (a) BBC has failed to offer any probative evidence on the Oscar Hyde character qualification issue in hearings held on January 8 and 22, 1974; [3] (b) the possible elimination of Oscar Hyde as a party to the applicant BBC will create

[1] For a brief recitation of the early history of this proceeding see Memorandum Opinion and Order, 34 FCC 2d 159, 24 RR 2d 51 n. 2 (1972).

[2] Other related pleadings before the Board for consideration are: (a) opposition, filed January 30, 1974, by BBC; and (b) opposition, filed January 31, 1974, by the Broadcast Bureau.

[3] By Order, FCC 74M-150, adopted February 7, 1974, the Presiding Judge denied Chapman's January 24, 1974 petition for summary judgment holding BBC in default for failure to prosecute the Oscar Hyde [character qualifications] issue.

a void in the financial and operating proposals of BBC; (c) the lending institutions on which BBC relies for financing no longer exist; and (d) the applicant has withheld this information from the Commission. Finally, urging that no further hearings will be required, Chapman requests that this determination be made solely on the basis of official notice of both the existing record and certain public records, as well as several accompanying exhibits.

3. Although Chapman's request is entitled a petition to declare BBC disqualified, it is, in substance, a request for dismissal of BBC's application. Accordingly, since the Commission's Rules clearly provide that a motion to dismiss an adverse party is within the original jurisdiction of the Administrative Law Judge, the Review Board may not entertain Chapman's motion in this regard. See *The Fox Broadcasting Co.*, 5 FCC 2d 669, 8 RR 2d 970 (1966); *American Colonial Broadcasting Corp.*, FCC 66R–427, 8 RR 2d 657 (1966); *Bay Broadcasting Co.*, 10 FCC 2d 331, 11 RR 2d 429 (1967); *WHCN, Inc.*, 25 FCC 2d 1024, 20 RR 2d 322 (1970). In any event, as noted above, the Presiding Judge has denied Chapman's simultaneously-filed petition for summary judgment in which the petitioner sought substantially similar relief. Thus, the instant petition, insofar as it encompasses the Oscar Hyde issue, has been previously considered and ruled upon. Finally, even though Chapman does not request enlargement of issues, we have considered the substance of its petition to the extent that it raises new matter. In our view, however, Chapman's allegations are inadequately supported and lack the specificity called for by Commission Rules and, accordingly, fail to raise a substantial question of fact concerning BBC's financial qualifications. Chapman's petition will therefore be dismissed on this latter basis, as well.

4. Accordingly, IT IS ORDERED, That the petition to declare Birmingham Broadcasting Company disqualified, filed January 24, 1974, by Chapman Radio and Television Co. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION.
VINCENT J. MULLINS, *Secretary.*

FCC 74-231

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of COMMUNITY TELEVISION OF MONTANA, INC., D.B.A. HELENA CABLE TV, HELENA, MONT. For Certificate of Compliance	CAC-1158 MTO44

MEMORANDUM OPINION AND ORDER

(Adopted March 7, 1974; Released March 15, 1974)

BY THE COMMISSION:

1. Community Television of Montana, Inc., d/b/a Helena Cable TV operates a cable television system at Helena, Montana, a smaller television market.[1] It currently carries the following television signals:

KUTV (NBC, Channel 2) Salt Lake City, Utah.
KCPX-TV (ABC, Channel 4) Salt Lake City, Utah.
KUED (Educ., Channel 7) Salt Lake City, Utah.
KSL-TV (CBS, Channel 5) Salt Lake City, Utah.
KBLL-TV (NBC/ABC, Channel 12) Helena, Montana.
KXLF-TV (ABC/CBS, Channel 4) Butte, Montana.
KFBB-TV (ABC/CBS, Channel 5) Great Falls, Montana.
KREM-TV (ABC, Channel 2) Spokane, Washington.
KHQ-TV (NBC, Channel 6) Spokane, Washington.
CJOC-TV (CBC, Channel 7) Lethbridge, Alberta, Canada.

On September 1, 1972, Helena Cable filed an application pursuant to Section 76.13(b) to add Station KWGN-TV (Ind., Ch. 2), Denver, Colorado to its complement of television signals. At the time of filing, the applicant assumed that CJOC-TV, already carried on its system, was an independent station.[2] If this were so, the system would not be entitled to an additional independent station pursuant to Section 76.59(b)(2) of the Commission's Rules. Therefore, applicant requested a waiver of this section to permit the requested carriage of KWGN-TV.

2. On November 20, 1972, similar objections to Helena Cable's application were filed by Garryowen Butte TV, Inc., licensee of Station KXLF-TV, Butte, Montana, and Harriscope Broadcasting Corp., licensee of Station KFBB-TV Great Falls, Montana. Both parties argued that because CJOC-TV is an independent station, Helena's

[1] Helena has a population of 22,730. The cable system commenced operations in February, 1955, and presently serves 4827 subscribers. Helena Cable has 12 channel capacity; ten are used for television signal carriage and two are reserved for future use.

[2] Section 76.5(n) of the Rules defines independent station as "A commercial television broadcast station that generally carries in prime time not more than 10 hours of programming per week offered by the three major national television networks".

proposed addition of KWGN–TV would violate Section 76.59(b) of the Commission's Rules. They maintained that the waiver request should be denied because Helena Cable's carriage of KWGN–TV would have detrimental impact on the viewership and economics of both KXLF–TV and KFBB–TV.

3. On December 1, 1972, Helena Cable filed a "Motion to Dismiss" the oppositions of Garryowen and Harriscope. It also amended its application, now arguing that CJOC–TV is not an independent station and thus carriage of KWGN–TV would be consistent with Section 76.59(b)(2) of the Rules. To support this claim, Helena submitted CJOC–TV program schedules covering a four-week period, and alleged that the programs shown therein included more than 10 hours of programming per week offered by the three major national networks. In opposing Helena Cable's motion to dismiss, both Garryowen and Harriscope have disputed Helena's characterization of specific programs carried by CJOC–TV as network programs, and argue that CJOC–TV carries less than the required ten hours per week of network programming and is, therefore, an "independent" station pursuant to the Commission's Rules.[3] In a subsequent filing, Helena has enclosed a telegram from CJOC–TV's production manager which indicates the day, hour of broadcast, and names of all major U.S. network programs carried weekly by CJOC–TV. The total shown is 10½ hours (even with the deletion of the programs disputed by Garryowen and Harriscope).

4. In *Community Tele-Communications, Inc.*, d/b/a *Anaconda Cable Television*,[4] we held that CJOC–TV is not an independent television station as defined by Section 76.5(n). The determining factor in categorizing a station based on its programming is the "amount of U.S. network programming carried" and not the program source and manner of carriage.[5] In the instant case Helena Cable has made a persuasive showing that CJOC–TV carries, in prime time, more than 10 hours of network programming per week. Because CJOC–TV is not an independent station, Helena is, in fact, entitled to carry KWGN–TV, pursuant to Section 76.59(b)(2) of our Rules. Helena's request for a waiver of Section 76.59 has, of course, been rendered moot. The allegations that permitting carriage of KWGN–TV will have an impact on the audience and economics of KXLF and KFBB–TV are purely speculative. There has been no showing of injury, present or future, and, therefore the argument must be rejected. *See Spectrum Cable System, Inc.* 40 FCC 2d 1019 (1973).

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be in the public interest.

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[3] Section 76.5(o) of the Rules defines network programming as "The programming supplied by a national or regional television network, commercial or noncommercial". Garryowen argued that certain programs, because they are "pre-released" to CJOC–TV or are obtained from syndicators, should not be considered network programs.

[4] 43 FCC 2d 503 (1973).

[5] *Community Tele-Communications, Inc., id.*

Accordingly, IT IS ORDERED, That the application for a certificate of compliance (CAC–1158) filed by Helena Cable Television, together with its amendment and additional pleadings, IS GRANTED, and an appropriate certificate will be issued.

IT IS FURTHER ORDERED, That the oppositions of Garryowen Butte TV, Inc., and Harriscope Broadcasting Corp., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74–126

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request of
COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA
Concerning Waiver of Cable Television Cross-Ownership Rules Involving Station KCET, Los Angeles, Calif.

FEBRUARY 11, 1974.

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA,
Los Angeles, Calif.

(Attention Mr. James L. Loper, President and General Manager)

GENTLEMEN: This is in response to your letter of January 20, 1972, requesting a waiver of the cable television cross-ownership rules [1] to enable Mr. Berle Adams to remain on the Board of Directors of Community Television of Southern California, licensee of noncommercial Television Broadcast Station KCET, Los Angeles, California, after his election January 11, 1972, to the Board of Directors of TelePrompTer Corporation.[2] You state that Mr. Adam's new position does not involve an ownership interest in TelePrompTer and that loss of such a longtime Board member would result in substantial hardship to Station KCET.

The Commission has carefully considered this situation and is satisfied that the public interest will be served by grant of the requested waiver.

Accordingly, Section 76.501 of the Commission's rules IS WAIVED to allow Mr. Berle Adams to remain on the Board of Directors of TelePrompTer Corporation and Community Television of Southern California.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[1] Previously these regulations were contained in Section 74.1131 of the Commission's Rules; they are now in Section 76.501 of the Rules.

[2] In your letter, you state that TelePrompTer Corp. ". . . among its multiple cable television interests, has interests in systems that operate within the Grade B contour of KCET."

FCC 74R-89

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of EASTERN MICHIGAN UNIVERSITY (WEMU (FM)), YPSILANTI, MICH. For Construction Permit To Make Changes	Docket No. 19911 File No. BPED-1648
THE REGENTS OF THE UNIVERSITY OF MICHIGAN (WCBN-FM), ANN ARBOR, MICH.	Docket No. 19912 File No. BRED-528
PLYMOUTH COMMUNITY SCHOOL DISTRICT (WSDP(FM)), PLYMOUTH, MICH. For Renewal of Licenses In Re Request of Eastern Michigan University for an Order To Show Cause Directed to	Docket No. 19913 File No. BRED-537
THE REGENTS OF THE UNIVERSITY OF MICHIGAN (WCBN-FM), ANN ARBOR, MICH.	Docket No. 19914

MEMORANDUM OPINION AND ORDER

(Adopted March 8, 1974; Released March 14, 1974)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. This proceeding consolidates for hearing the application of Eastern Michigan University (WEMU(FM)) (hereinafter Eastern) to make changes in its existing facility, the renewal applications of The Regents of the University of Michigan (WCBN-FM) (hereinafter Regents) and Plymouth Community School District (WSDP(FM)) (hereinafter Plymouth), and the order to show cause request of Eastern directed to Regents. Now before the Review Board is a petition for modification of issues, filed January 22, 1974, by the Broadcast Bureau in which the Bureau requests that the burden of proceeding and the burden of proof on certain designated issues be modified.[1]

2. In this proceeding, Eastern seeks to make changes in its facilities which, as proposed, would cause interference with the present operations of Regents and Plymouth. These changes, according to Eastern, can only be effectuated if Regents changes its frequency of operation from 89.5 MHz to 88.3 MHz and Eastern changes its frequency to 89.1 MHz. Regents asserts, however, that a change in its frequency would cause interference to television Station WJIM, Lansing, Michigan (CBS), and that pre-designation attempts by the parties to determine the extent of that interference were unsuccessful. By Memo-

[1] The Review Board also has before it for consideration: (a) and (b), oppositions, filed on February 1, 1974, by Regents, and on February 6, 1974, by Eastern; and (c) a reply to the oppositions, filed on February 12, 1974, by the Bureau.

randum Opinion and Order, released January 10, 1974, FCC 74–17, 39 FR 2796, the Commission designated the above-captioned applications for hearing and granted Eastern's petition for an Order directed against Regents to show cause why its station's frequency should not be modified. Issues 5 and 6, the subject of the Bureau's modification request, were designated by the Commission as follows:

> 5. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the license of station WCBN–FM should be modified to specify operation on channel 202 (88.3 MHz).
>
> 6. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether grant of the applications of Eastern Michigan University, the University of Michigan, and the Plymouth Community School District, or any of them, as proposed or as modified, would serve the public interest, convenience and necessity.

The Commission placed the burden of proceeding and the burden of proof under Issue 5 on the Bureau, and under Issue 6, on each of the applicants with regard to their respective application.

3. In its petition for modification, the Bureau alleges that the burdens placed on it as to Issue 5 were mistaken. First, the Bureau argues that Issue 5 is conclusory in nature and therefore it is not necessary to place any burden of proceeding under that issue. With regard to the burden of proof, the Bureau maintains that since Eastern is requesting that Regents' frequency be changed, it should bear the burden of proof under this issue. With respect to Issue 6, the Bureau argues that the respective burdens of proof were properly assigned, but, since Issue 6 is also conclusory, the Commission mistakenly assigned burdens of proceeding.

4. In opposition, Eastern maintains that its show cause request, pursuant to Section 1.87 of the Commission's Rules, is predicated on the statutory requirements of Section 316 of the Communications Act of 1934, as amended, which, in subsection (b), provides that:

> In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

Eastern argues that the Commission, under the clear mandate of Section 316(b), had no choice but to place the burdens of proceeding and proof on the Bureau and that to do otherwise would be inconsistent with the terms of Section 316(b). In its opposition, Regents agrees with Eastern that Section 316(b) requires that the Bureau assume the burden of proof under Issue 5, but states that it has no objection to regarding the issue as conclusory with respect to eliminating the burden of proceeding.

5. In reply, the Bureau argues that this is not solely a proceeding pursuant to Section 316 of the Act, but that it involves both applications for renewal of license and a request for a show cause order and, therefore, the language of 316 does not apply. The Bureau maintains that in an analogous situation—involving both renewal and revoca-

104-030—74——2

tion [2]—the Commission held that once the revocation proceeding—in which the Bureau had the burdens—was consolidated with the renewal proceeding, the burden of proof shifted to the renewal applicant. The Bureau also contends that if this was exclusively a proceeding pursuant to Section 316, the Commission would have placed the burdens of proceeding and of proof on the Bureau under all of the designated issues.

6. The statutory provisions of the Communications Act of 1934, as amended, specifically provide for the assignment of the burden of proceeding and the burden of proof based upon the particular nature of the proceeding. See Sections 309, 312 and 316 of the Act. In situations where a renewal and revocation proceeding have been consolidated for hearing, the Commission has been assigned the burdens as to the revocation aspect of the proceeding, and the applicant as to the renewal, even though the same issues were involved. See *Seaboard Broadcasting Corporation, supra; Radio Station WTIF, Inc.*, FCC 64–228, 2 RR 2d 305.[3] The Board sees no reason to deviate from that principle here. Since Eastern is seeking modification of Regents' license in order to make feasible its requested changes, it (Eastern) should bear the burden of proof under Issue 5 as it relates to the application aspect of this proceeding.[4] Pursuant to Section 316(b), however, the Bureau must assume the burden of proof with respect to the show cause aspect of the proceeding.[5] Finally, since Issues 5 and 6 are conclusory, the assignment of burdens of proceeding under these issues will be eliminated.

7. Accordingly, IT IS ORDERED, That the Broadcast Bureau's petition for modification of issues, filed January 22, 1974, IS GRANTED to the extent indicated herein; in all other respects, the petition IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] The Bureau cites *Seaboard Broadcasting Corporation*, 26 FCC 2d 653, 20 RR 2d 791 (1970).

[3] In *Seaboard, supra*, cited by the Bureau, the Commission terminated the revocation aspect of the consolidated revocation and renewal proceeding, and thereby eliminated the Bureau's burden of proof in that proceeding. The renewal applicant continued to carry the burden of proof in the renewal proceeding. That situation is not present here and, therefore, we view the Bureau's interpretation of *Seaboard* to be erroneous.

[4] The Board notes that the determination of whether to proceed first with the application or show cause aspects of the proceeding is within the sound discretion of the presiding officer. *Cf. Radio Station WTIF, Inc., supra.*

[5] Regents represents, in its opposition, that it will consent to a modification of its license, providing there is no objectionable interference. In that event, the Show Cause aspects of this proceeding may in fact become moot. Otherwise, the Bureau will bear the burdens in showing why Regents' license should be modified.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaints of
SIERRA CLUB AND NATIONAL COUNCIL OF JEWISH WOMEN
Concerning the Fairness Doctrine Against Stations KTTV and KNXT, Los Angeles, Calif.

MARCH 13, 1974.

MR. JOHN R. PHILLIPS,
Center for Law in the Public Interest,
Los Angeles, Calif.

DEAR MR. PHILLIPS: This is in reference to the complaints filed on behalf of the Sierra Club and the National Council of Jewish Women against television stations KTTV and KNXT, Los Angeles, California, dated May 7, 1973 and July 9, 1973 respectively, in which you alleged that the licensees incurred obligations under the fairness doctrine by broadcasting "a large number of automobile and gasoline advertisements which present any number of reasons why viewers should buy and use those polluting products."

With respect to KTTV, you stated that the station "each week airs a large number of advertisements which present one side of the controversy produced by automobile pollution"; that while *Friends of the Earth* v. *FCC*, 146 U.S. App. D.C. 88, 449 F. 2d 1164 (1971), concerned advertisements for large cars and leaded gasoline, "in the context of the current controversy produced by automobile pollution in Los Angeles, advertisements for *all* kinds of automobiles and gasolines present one side of the issue"; that "health hazards due to automobile pollution in Los Angeles have made the use of private automobiles a controversial issue of public importance"; that "the controversial issue of public importance is whether Los Angeles residents must reduce the use of private automobiles and the consumption of gasoline to achieve clean, healthful air"; that KTTV "presents virtually no information on the other side of this controversial issue"; and that the Commission should investigate this complaint and take "necessary and appropriate action . . . to bring KTTV into compliance with the requirement of the Federal Communications Act."

With respect to KNXT, you stated that it "each week airs a large number of advertisements which present one side of the controversy produced by automobile pollution"; that the Court of Appeals' decision in *Friends of the Earth*, *supra*, and the Commission's *Interim Memorandum Opinion and Order on Remand*, 39 FCC 2d 564 (1973), "clearly hold that *at least some* automobile and gasoline advertisements raise fairness doctrine obligations"; that "in the context of the current

controversy produced by automobile pollution in Los Angeles, advertisements for *all kinds of automobiles and gasolines* present one side of the issue"; that "KNXT does not provide a 'substantial treatment' of opposing views on this controversial issue"; that the "National Environmental Policy Act (NEPA) of 1969, Public Law 91–190, 83 Stat. 852, requires the Commission to interpret the fairness obligation of KNXT in light of its effect on the environment"; and that the Commission has responsibility to take "necessary and appropriate action" to bring KNXT into compliance with the requirements of the Communications Act.

You stated that your clients continuously monitored KTTV's programming during the week of January 6 to January 12, 1973 and determined that during this period, "KTTV aired 141 advertisements totaling 155 minutes, for all kinds of automobiles and gasolines." You stated that on a subsequent week, from January 29 to February 4, 1973, your clients monitored the programming of KTTV but "found no programming of any kind which described the health hazards produced by automobile pollution or urged viewers to reduce the use of automobiles and encourage the development and use of alternative modes of transportation." You also stated that "A review of programming listed in *TV Guide* for the month of January revealed a similar lack of programming." With respect to KNXT, you stated that during the week of January 6 to January 12, 1973 your clients monitored 157 automobile and gasoline announcements by the licensee, totaling 180 minutes. You provide brief descriptions of four spot announcements broadcast by KNXT during the period January 31 to February 3, 1973. Those descriptions are as follows:

(1) *January 31, 1973 at 9:59 p.m.:* An advertisement for Pontiac which asks, "looking for a big, comfortable car to move up to?"

(2) *February 1, 1973 at 11:55 p.m.:* An advertisement for Dodge which claims that cars are indispensable in Southern California.

(3) *February 3, 1973 at 3:11 p.m.:* An advertisement for Ford picturing the car driving through the unpolluted countryside.

(4) *February 1, 1973 at 9:00 p.m.:* An advertisement for Toyota in which a 16-year old girl is given a car for her birthday, indicating now she is "grown up" she deserves her own car to drive.

You stated that "These advertisements, and the other automobile and gasoline advertisements broadcast by KNXT give rise to a fairness doctrine responsibility." You further stated that on February 27, 1973 your clients addressed a letter to KTTV "asking how the station intends to discharge its obligations under the fairness doctrine and offering to help the station to develop appropriate programming, including spot announcements"; and that your clients had not yet received a response. In regard to KNXT, you stated that on February 27, 1973 you sent a letter to the licensee's general manager, "inquiring how KNXT has met the fairness doctrine responsibility created by its broadcasting of automobile and gasoline advertisements." The licensee's reply, which you attached as "Appendix B" to your complaint, questioned your assertion that the fairness doctrine applies to the ad-

vertisements in question, and maintained that "The broadcast schedule of KNXT has, in fact, included extensive broadcast material—such as news broadcasts and public service announcements—which have dealt with all phases of environmental pollution, including air pollution." The licensee stated that since 1970, KNXT had employed "a full-time Environmental Editor whose function is to investigate, prepare and broadcast reports concerning all significant developments affecting the environment in the Los Angeles area." In a subsequent letter to you, the licensee declined your request for written copies of presentations made by the Environmental Editor and transcripts of certain public service announcements related to pollution.

If a broadcaster presents one side of a controversial issue of public importance, he is required under the fairness doctrine to afford reasonable opportunity in his overall programming for the presentation of contrasting views. Where a fairness complaint is made to the Commission, the burden is on the complainant to specify the particular issue involved and substantiate its controversiality and public importance, and also to show that particular broadcast material has presented one side of that issue and that the licensee neither afforded nor intends to afford reasonable opportunity in his overall programming for the presentation of contrasting views. See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964); *Allen C. Phelps*, 21 FCC 2d 12 (1969). The issue allegedly raised by the advertisements is variously stated by you to be either "the purchase and use of private automobiles" in Los Angeles or "whether Los Angeles residents must reduce the use of private automobiles and the consumption of gasoline to achieve clear, healthful air." However, while there are distinctions between the two, a demand or search for further specificity here would not be particularly helpful. For the gravemen of the complaint appears to be a general concern with the relationship of the use of private automobiles to pollution.

You have submitted no transcripts or comprehensive summaries of the advertisements in question, and the brief, one-phrase characterizations which you did submit do not indicate how any of the advertisements were specifically related to any question of air pollution and the use of automobiles and gasoline, beyond the generalized issue mentioned above. For example, an advertisement showing a car being driven "through the unpolluted countryside" or implying that a 16-year old girl deserves her own car to drive does not argue any particular aspect of the problem of pollution. *Friends of the Earth* v. *FCC*, supra, upon which your complaints have been primarily founded, does not stand for the broad proposition that the broadcast of any or all automobile and gasoline advertisements *ipso facto* engenders fairness doctrine obligations. Noting that "Matters of degree arise in environmental control, as in other areas of legal regulation," the court there held that:

> * * * to say that all automobiles pollute the atmosphere is not to say that some do not pollute more than others. Voices have already been lifted against the fetish of unnecessary horsepower; and some gasoline refiners have begun to make a virture of necessity by extolling their non-leaded less dynamic brands of gasoline.

Commercials which continue to insinuate that the human personality finds greater fulfillment in the large car with the quick getaway do, it seems to us, ventilate a point of view which not only has become controversial but involves an issue of public importance. When there is undisputed evidence, as there is here, that the hazards to health implicit in air pollution are enlarged and aggravated by such products, the parallel with cigarette advertising is exact and the relevance of *Banzhaf* inescapable. 449 F. 2d at 1168.

As the Commission stated in its *Interim Memorandum Opinion and Order on Remand*, 33 FCC 2d 648 (1972): ". . . we read the opinion of the Court Appeals as holding that while there is an overall problem of pollution caused by the use of automobiles it is the advertising of large engine cars (and leaded gasolines) typified by the particular commercial announcements relied upon by *Friends of the Earth* which present a point of view which is both controversial and involves an issue of public importance." *Id.* at 651. You have not shown that any such advertisements are at issue here, and therefore your reliance on *Friends of the Earth* appears inapposite.

What we are left with, therefore, is the question of whether the product advertisement *per se* raises a fairness issue. The Commission has held that it does not,[1] and, pending any revision of the fairness doctrine to envelope such issues,[2] that ruling is applicable here.

With respect to your contention that the National Environmental Policy Act directs the Commission to interpret the fairness doctrine "in light of [its] effect on the environment," the Commission does not read the Act as altering the scope of the fairness doctrine. Rather, the Act directs the Commission to consider in its substantive decisions the tangible effect upon the environment which may be produced, for example, by a particular authorization to operate radio transmitting equipment, such as the issuance of a construction permit for the erection of a broadcast tower or other facility.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

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[1] *Alan F. Neckritz et al*, 34 FCC 2d 579 (1972) [Now on appeal in U.S. Court of Appeals for the District of Columbia Circuit, *sub. nom. Alan F. Neckritz et al* v. *FCC* (Case No. 71-1392)].

[2] It should be noted here that the Commission's inquiry into the efficacy of the fairness doctrine and related public interest policies (*Notice of Inquiry*, 30 FCC 2d 26 (1971)) is reviewing the applicability of the doctrine to the carriage of product commercials and questions concerning the "implicit" advocacy of views on public issues which may be contained in such advertisements. The report on these and other fairness matters is anticipated in the near future and is expected to set forth more fully the Commission's interpretation and policy with respect thereto.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
DR. JAMES M. TOOLE
Concerning the Fairness Doctrine Against
Stations WBRE–AM–FM–TV, Wilkes-
Barre, Pa.

MARCH 13, 1974.

DR. JAMES M. TOOLE,
Chairman, Board of Trustees,
Luzerne County Community College,
Wilkes-Barre, Pa.

DEAR DR. TOOLE: This is in response to your letter of September 19, 1973 in which you complained that on June 25, 1973 the licensee of Stations WBRE–AM–FM–TV, Wilkes-Barre, Pennsylvania, broadcast an editorial containing a personal attack upon you and the Board of Trustees of Luzerne County Community College. You requested the Commission to require that the licensee afford you the opportunity to broadcast a reply to the editorial; to issue a citation against the licensee for violation of Section 73.123 of the Commission's Rules and Regulations and for "using the station in a manner not in accordance or in alignment with the intent of the First Amendment"; and to "enjoin" the station from "presenting editorials in a situation where one of the station owners and its Vice President is directly involved."

You enclosed copies of six editorials broadcast by the licensee between May 12, 1972 and September 11, 1973, and allege that each of them "was not delivered in compliance with" Section 73.123(a) of the Commission's Rules and Regulations.[1] However, with the exception of the editorial of June 25, 1973, you have not requested the Commission to direct the licensee to afford you time to reply.

You cited a number of statements in the June 25, 1973 editorial which you alleged constituted attacks on the character, honesty, integrity, or like personal qualities of you or the Luzerne County Community College Board of Trustees. The editorial stated:

> A weekend revelation that majority members of the Luzerne County Community College Board of Trustees has advised College President Dr. Guy Farrell to quit or be fired really is not much of a surprise. It has been rumored this would happen ever since Dr. Farrell made it clear he was running a College and

[1] Section 73.123(a) states: "(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities."

not a patronage mill. The rumors grew as Commissioner Edmund Wideman succeeded in appointing a majority to the Board of Trustees.

Dr. Farrell is not perfect but then no one is, including Commissioner Wideman. Dr. Farrell did come into the community when the Community College was only a concept and within an astoundingly short span of only seven months converted that concept into a curriculum, faculty, building, and student body. It would be unhuman if, in the tumultous [sic] years that followed his hiring, years in which faculty, curriculum, facilities and student body have grown steadily in size and academic prestige, that some mistakes were not made. However, it is not for mistakes that Dr. Farrell has had to face the insolence of academic incompetents asking for his resignation.

If mistakes are the issue, then it is the appointees of Commissioner Wideman who should be on the line with the option of resigning or being fired. It is these appointees who have honored political nepotism over academic ability, who have forced their questionable administrative and academic ideas into those of the College and in violation of practices which limit Trustees to policy, only. And it is Mr. Wideman's majority which has demonstrated that if unchecked it has the ability to subvert the College into just another political arm of the County Board of Commissioners.

The move to fire Dr. Farrell is not much of a surprise—considering the record of Mr. Wideman's leadership, but for the taxpayers of Luzerne County, many of whose sons and daughters are dependent on the Community College for their education, it is both an insult and a threat. They should demand that the principles, and hopeful [sic] the person, of Dr. Farrell will persevere.

The first statement to which you referred appears in the first paragraph of the foregoing editorial; this statement was ". . . he [Dr. Farrell] was running a College and not a patronage mill." You contended that this statement ". . . reflects on the motives of Board members for serving on the Board of Trustees . . . ," and that the meaning of the statement is that "... Board Members serve for dishonest reasons and therefore are clearly of low character and of questionable integrity." In reviewing personal attack complaints, the Commission's function is not to substitute its own judgment for that of the licensee, but to determine whether the licensee has acted reasonably and in good faith in arriving at its decision as to whether a personal attack has been made. *Sidney Willens and Russell Millin*, 33 FCC 2d 304 (1972). With regard to the cited statement, it would not have been unreasonable to conclude that the thrust of the statement was not aimed at imputing dishonest motives to the Board members. Rather, a reasonable interpretation could lead to the conclusion that the statement did not refer to the Board members in any way, and that the intent of the statement was to praise the manner in which Dr. Farrell carried out his responsibilities. Accordingly, the Bureau cannot conclude that the cited statement constituted a personal attack on the Board members necessitating action by the station under the personal attack rules.

The second statement to which you referred stated, ". . . to face the insolence of academic incompetents asking for his resignation." You contended that this statement "is insulting to all members of the Board, but particularly so to those members who are employed in academic endeavors. Certainly this is a flagrant insult, and was delivered in a voice which emphasized the insult." Mere mention of a person or group, or even certain types of unfavorable references thereto, do not constitute personal attacks as defined by the Commission. As

noted in *Rome Hospital and Murphy Memorial Hospital*, 40 FCC 2d 452 (1973):

> An "incompetent" person is defined in Webster's dictionary as a person "without adequate ability or knowledge . . ." Honesty, character, integrity and other like qualities applicable to the personal attack rule are characteristics which relate to personal credibility or moral turpitude of an individual and not to the particular individual's ability or knowledge. Accordingly, it does not appear that the use of the word "incompetent" constitutes a personal attack, as defined by the Commission's rules. *Id.* at 453.

Thirdly, you referred to the phrase, ". . . appointees of Commissioner Wideman . . ." and stated that phrase "is an attempt to associate majority Board Members with a political figure for whom the station has a clear vendetta. The purpose of it can only be construed as an attack upon the integrity of members of the Board." However, you provided no information or argument as to how a statement that a board member was an appointee of a County Commissioner reflected in any way upon that board member's character, honesty, or integrity. As stated in the Commission's Public Notice of September 29, 1972, "The Public and Broadcasting, Procedural Manual," with reference to personal attack complaints: The complaint should contain specific information concerning the following matters:

> * * * (4) the basis for your view that the words broadcast constitute an attack upon the honesty, character, integrity, or like personal qualities of you or your group . . . 37 Fed. Reg. 20510, 20512.

The allegations which you make regarding the fourth, fifth and sixth statements which you cite from the June 25th editorial [2] are essentially the same, insofar as they relate to the operation of the personal attack doctrine. You assert that the fourth statement is "an attempt to disparage individuals by attacking their honesty, character and integrity." As to the fifth statement, you contend that "(a)gain the attempt is being made to associate the Board Members with a political office holder for the purpose of making it appear that the Board is politically motivated, and therefore dishonest by misrepresentation. Furthermore, the editorialist infers dishonesty, poor character and integrity by misrepresenting its intent." With reference to the sixth statement, you assert that it constitutes ". . . the political association and the inference that the Board is ruled by a political figure, not the Board, and therefore the Board members' personal qualities are attacked." Essentially, these allegations are reducible to a charge that the editorial statements each imputed a political motivation to the Board of Trustees, and, therefore, constituted a personal attack upon the Board members. However, the mere imputation of political motivation to an appointed official does not, of itself, constitute an attack on character, honesty, integrity or like personal qualities. See *John Cervase*, 42 FCC 2d 613 (1973), *petition for reconsideration denied*, 42 FCC 2d 1104 (1973).

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[2] The fourth, fifth and sixth statements to which you refer are:
4. "(T)hese appointees . . . have honored political nepotism over academic ability. . ."
5. "And it is Mr. Wideman's majority which has demonstrated that if unchecked it has the ability to subvert the College into just another political arm of the County Board of Commissioners."
6. ". . . considering the record of Mr. Wideman's leadership. . ."

In further reference to the fourth statement cited, you characterize its contents as:

> . . . a bold-faced lie, as no such nepotism has been practiced . . .Furthermore the statement refers to ". . . practices which limit Trustees to policy, only," and this is in fact a deception of the public since no such practices are recorded.

With respect to this allegation that the editorial contained deliberate distortions or falsifications of facts, the Commission's policy in this area is set forth in its *Letter to Mrs. J. R. Paul*, 26 FCC 2d 591 (1969), a copy of which is enclosed. As you will note, the Commission believes that it, as the government licensing agency, should not attempt to determine the "truth" of a given situation and whether a news report has given the "truth". Rather, it will take action in such cases only when it has substantial extrinsic evidence that the licensee has deliberately distorted its news reports or has staged news events.

In regard to the editorial of September 11, 1973 your letter indicates that the licensee did notify the Board of Trustees within one week of its broadcast, provide a recording, transcript or accurate summary of the editorial, and offer a reasonable opportunity to reply. Accordingly, it is not necessary to reach the question of whether the September 11 editorial broadcast a personal attack during the discussion of a controversial issue of public importance.

With respect to the other four editorials which you allege contain personal attacks, each was broadcast approximately one year or more prior to the filing of your complaint. The Commission expects a complaint to be brought within a reasonable time after the complainant becomes aware of the incident in question, so that the licensee and the Commission may take necessary action in a timely manner. The four editorials in question were broadcast on dates ranging from May 12, 1972 to September 21, 1972, and you did not file your complaint about these broadcasts until September 19, 1973. We of course must take cognizance of this in our consideration herein in terms of the difficulties involved, particularly with respect to memories of the parties of relevant incidents. However, we shall discuss the matters raised by you regarding these editorials.

In regard to the May 12, 1972 editorial, you object to the editorialist's analogy that the appointment of members of other private colleges to serve on the Board of Trustees of the Community College is like "appointing officials of other area banks and savings and loan institutions to serve as the Board of Directors for the Wyoming National Bank." You also object to the last paragraph of the May 12 editorial, as, in your words, "an attempt to endanger the employment of certain Board Members by placing their employers (private academic institutions) in embarrassing positions." However, the mere allegation that certain conflicts of interest exist or even in some cases that a person has violated a statute, does not constitute a personal attack on that individual absent statements that call into question his honesty, character or integrity. Thus, in *Paul E. Driscoll*, 40 FCC 2d 448 (1973), the Bureau held that statements which alleged that the Roman Catholic Church, and by implication complainant himself,

were lobbying against New York's liberalized abortion law contrary to the Church's tax-exempt status under the Internal Revenue laws did not evidence a personal attack within the meaning of the Commission's rules. As the Bureau stated:

> . . . [I]t should be clear that not all charges of illegality present attacks on honesty, character or integrity. One may assert that a person or group has in fact acted in violation of the law although the person or group assumed that such action was in full accord with the law's provisions. In such a case, the charge is one of "illegality", but it is the judgment of the person or group in interpreting the law which is questioned, not their honesty, character or integrity. *Id.* at 450.

The licensee's May 15, 1972 editorial discussed an argument that the Community College was duplicating the functions of the Wilkes-Barre Business College. You object to the editorial's statement that "[t]hose who advance [this argument] either are misinformed or are serving something else than the interests and needs of the students of the Community College and the taxpayers who make that service possible." Although you do not state to what identified person or group these "aspersions" were directed, apparently they refer to those who contend the Community College is duplicating the functions of the Business College. It does not appear that the statement constituted an attack upon the honesty, character, or integrity of an identified person or group. A fair reading of the editorial rather suggests that it is a discussion of an idea or argument, rather than the character of any individual or group. A criticism of an individual's reasoning or conclusions does not constitute an attack upon that person's honesty, character or integrity within the meaning of the personal attack rule. See *Robert B. Choate*, 29 FCC 2d 73 (1971).

With respect to the licensee's May 22, 1972 editorial, you object to a statement that the Community College is intended to serve the needs of the community, rather than "the interests of its sponsors, the Board of Trustees or its administrators and faculty." You maintain that this statement constitutes an "inference that the Board is using the College for its own interests, and therefore [is] an attack upon the honesty, character and integrity of Board members." However, a charge that trustees or directors of a public body are exercising their authority for their own benefit, rather than that of the public, does not necessarily constitute a personal attack, particularly in absence of specification that such actions involve moral turpitude. In *Port of New York Authority*, 25 FCC 2d 417 (1970), the licensee broadcast a statement that the commissioners of the Port Authority had not performed their function, "which was to develop the port as a whole, and not merely in a way that was most profitable to them." This criticism was held not to be a personal attack. As stated in that case:

. . . strong disagreement, even vehemently expressed, does not constitute a personal attack, in the absence of an attack upon character or integrity. 25 FCC 2d 417, 418.

You also state that the licensee's editorial of September 21, 1972 "is an attack on the personal qualities of members of the Board of Trustees who are also members of other educational (private) institutions." Your complaint alleges that the editorial claims that "under the direction of the private institutions, through their employees who are members of the Board, the Board has attempted to control the Community College to prevent competition, and to so lower costs as to destroy the Community College." This allegation is similar to your complaint in regard to the May 22, 1972 editorial, namely, that the editorial charges the Trustees with exercising their authority improperly. A reading of the September 21 editorial discloses the following contentions:

a. The Board of Trustees is "led by and heavily populated with members of the faculty and administration of private colleges;
b. These Trustees fear competition and "would prefer to keep [the College] in swaddling than in pants, and that both would be happier if it weren't at all."

These criticisms concern the manner in which the Trustees discharge their official duties, but do not constitute an attack on their honesty, character, or integrity. *Port of New York Authority*, *supra*.

With respect to your request that the Commission enjoin the licensee from the presentation of editorials on any particular subject, under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from censoring broadcast material. Accordingly, the Commission may neither prohibit nor compel the broadcast of particular matter.

Your complaint alleges violations of the personal attack rule, rather than the fairness doctrine. However, the fairness doctrine may be applicable to the matters about which you complain. If a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. The fairness doctrine, therefore, does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming, which, of course, includes statements or actions reported on news programs and given in editorials. Both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. For your further information, we are enclosing a copy of the Commission's Public Notice of July 1, 1964, entitled, "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance." (See page 10416 therein as to the procedure to follow in filing fairness doctrine complaints.)

On the basis of your complaint to the Commission no action appears warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
NEW YORK CITY TRANSIT AUTHORITY
Concerning the Fairness Doctrine Against
Station WNEW–TV, New York City

MARCH 12, 1974.

DR. WILLIAM J. RONAN,
Chairman and Chief Executive Officer,
New York City Transit Authority,
Brooklyn, N.Y.

DEAR DR. RONAN: This letter further refers to the complaint and associated pleadings filed by you on behalf of the New York City Transit Authority (the Authority) against Metromedia, Incorporated, the licensee of station WNEW–TV, New York City. That complaint alleges, in substance, that the licensee violated the Commission's policies relative to deliberate distortion of the news and further asserts that the station failed to meet its obligations under the fairness doctrine by refusing to provide the Authority or its representatives "time or treatment equal to the charges" raised in licensee's reportage of news events pertinent to the operation of the Authority, particularly as that news reportage relates to the broadcast of licensee's newsfilm presented first on December 5, 1972.[1] You request that the Commission designate a hearing to ascertain the facts relative to the issues emanating from those allegations.

THE COMPLAINT

On December 5, 1972, respondent devoted approximately twenty (20) minutes of its Ten O'Clock News Program, to the broadcast of a news film and interviews with three individuals—the two Authority employees who shot the film, Messrs. Stone and Schussel, and Mr.

[1] The complaint considered herein was filed with the Commission on January 3, 1973. The parties to the proceeding filed responsive pleadings through July 1973. In addition to a tape of the Authority's rebuttal to the WNEW–TV newsfilm which forms the basis of the complaint, over seven hundred (700) pages of affidavits, investigation reports, scripts of the station's newscasts, facsimiles of newspaper copy, testimony by Authority and station employees, statements and conclusions of polygraph experts, and memoranda of fact and law have been received. It is noteworthy that the station's newsfilm which is challenged by the Authority here generated at least five civil and criminal proceedings before judicial and administrative tribunals, in addition to the matter before the Commission. That newsfilm, broadcast first on December 5, 1972, caused, among other events, the institution of disciplinary proceedings against the two Authority employees responsible for the film's production, a criminal indictment and trial against two other Authority employees depicted in the film, and investigations or attempted investigations into the Authority's employment, pension, overtime and general operating procedures by a select commission whose members were appointed by the Mayor of the City. The evidence submitted further indicates that the controversy generated by the broadcast of this film, at one time or another, received attention from the City's Mayor, City Council, State government agencies and commissions, various district attorneys, citizens groups and labor unions representing the Authority's employees.

Robert Postel, who at the time was a candidate for Mayor of the City as well as a member of the New York City Council. The presentation of the film—three minutes and six seconds in length—was broadcast without recorded audio, but pictured events which allegedly transpired on the premises of the Authority's 240th Street and Broadway car inspection barn in the Borough of the Bronx. Stone and Schussel, the film's producers and cameramen, provided "talkover" descriptions of the scenes depicted in the film while being queried by a station newsman. The subsequent interviews conducted by the station's news personnel with Stone, Schussel and Postel elicited comment which was highly unfavorable to the Authority' operation as well as descriptions of certain Authority practices which were characterized as "abuses." Among the scenes depicted in the film were events purporting to show Authority car inspectors and other workmen engaging in card playing and beer drinking, repair of employees' personal automobiles, sleeping, and one instance of an Authority employee threatening Schussel with a knife, while Stone shot footage of the scene. All these events were orally described by Schussel and Stone as occurring during normal working hours. The discussion following the film's broadcast asserted that events such as those depicted were common occurrences and indicated mismanagement of the Transit Authority system in payments of overtime and pensions, general laxity of supervision over Authority personnel, favoritism in the allocation of overtime work, all of which, it was charged, resulted in gross overpayments in salaries and pension benefits, reduced efficiency in the public transportation system, and threats to the safety of commuters who utilized the services of the Authority's public transportation system. At one point during the discussion following the film's presentation on December 5, Postel charged, *inter alia:*

> POSTEL. . . . there's no doubt in my mind that we have vast, massive corruption in the transit system.
>
> ROLAND (licensee's newsman). Councilman [Postel], who's responsible for letting this get the way it is and what can be done to stop it?
>
> POSTEL. Well, there's no doubt in my mind again that this practice [abuse in allocation of overtime and pension payments] has continued because of a conspiracy on the part of the Transit Authority officials and transit worker union officials. In addition, however, I think that we have to hold accountable both the Department of Investigation, the Bronx District Attorney's office, the U.S. Attorney's Office, the Transit Authority, Mr. [William J.] Ronan himself, and perhaps, even the Governor; they have permitted a practice to go on which is robbing the public; robbing the public of its money and robbing the public of an opportunity to travel safely on the transit system. (Script of December 5, 1972, WNEW–TV Ten O'Clock Newscast, at p. 10)

The following day, December 6, 1972, the Authority requested the station to provide it with a copy of the newsfilm presented the preceding evening. The station, at that time, refused the Authority's request on the advice of its executive news management, namely that to grant the request would violate certain professional ethics. Later, however, on December 7, 1972, the station provided the Authority with a copy of the film and at that point the Authority commenced an investigation, apparently into the authenticity of the events depicted in the film and the propriety of Stone and Schussel's shooting the film on Authority premises.

That investigation caused the testimony of approximately thirty (30) Authority employees, all of whom had been depicted in the film, to be taken. In general, the testimony taken alleged that the events depicted in the film were shot only because the film's producers, Authority employees Stone and Schussel, had informed their colleagues that the film was to be used as "home movies" and that the Authority employees depicted in the film were asked to pose for the scenes shot, requests with which most of the employees assert they complied. Testimony elicited during the Authority's investigation into the incidents portrayed in the film appeared to raise questions about the authenticity of one scene in particular, that where car cleaner Hubert A. Carey was shown approaching Schussel with an open-blade knife, giving the appearance that Schussel was being threatened by Carey. Carey gave the following testimony:

Q. On Monday, December 4, 1972, in the afternoon, I understand that you were involved in an incident with Car Inspectors D. Stone and B. Schussel, do you recall that particular day?

A. I recall the day, but it was not no (sic) incident.

Q. Would you explain to us what happened on that day in connection with these men?

A. Yes, well, I had just come from taking the transfer slips from the tower and I was going out of the office and I saw Schussel and Stone, and Schussel was standing by the table and Stone was a little further up. Stone told me and he said, "Well, Schussel does not have his knife today, take his knife and get after him." He gave me the knife and I just kidding him and not knowing that Stone had a camera, I didn't see, but I saw something heavy up here, but I didn't know what it was, and that was the way it was. I gave it back to him and I walked away and that is all, and it took place in a minute or two.

Q. Car Inspector Stone gave you the knife?

A. Yes.

Q. And you handed it back to him?

A. Yes.

Transcript, Investigation in the Matter of Overtime in the Car Maintenance Department, 240th Street Inspection Barn, December 6–7, 1972, at 87–8.

Ivan Franklin, also employed as an Authority Car Cleaner, asserted during his testimony at the same Authority inquiry that Stone also had requested him to approach Schussel with Stone's knife and to give the appearance that he was threatening Schussel. Franklin, however, stated that he refused to participate. Additional testimony taken at the Authority inquiry and statements given in affidavits executed by Authority employees alleged that none of the scenes depicted in the Stone/Schussel film occurred during normal working hours as had been stated during the WNEW–TV newscast of December 5. Rather, the witnesses and deponents alleged, the scenes were shot during luncheon or end of the day wash-up periods, technically outside working hours. The Authority alleges that the film was shot by Stone and Schussel, who at the time were employed by the Authority and who undertook the project without supervision by licensee's news personnel. In this regard, the Authority contends that Stone and Schussel were not "reliable news sources"; that the station, prior to December 5 broadcast of the film, did not attempt to verify the authenticity of the scenes portrayed with the Authority employees depicted in the film; and that the licensee failed to exercise reasonable diligence to ascertain the veracity of the film's depictions by not permitting

Authority representatives to screen the film prior to the December 5 broadcast.

The Authority finally alleges that following the December 5 broadcast of the film, it prepared a twenty-minute taped rebuttal to the charges raised by the Stone/Schussel film and submitted that film to the licensee with the request that the Authority's filmed rebuttal be presented on the Ten O'Clock News on two successive evenings, and that the licensee promote the rebuttal during the early evening newscast. The licensee, says the Authority, wholly failed to meet these requests, but instead presented the challenged newsfilm for the third time on December 12 before showing the Authority's rebuttal for the first time. The Authority asserts that the licensee's failure to give equal exposure to the rebuttal film prepared by the Authority conclusively shows licensee's failure to meet its obligations under the fairness doctrine.

THE RESPONSE

The licensee answered the Authority's charges with a series of pleadings denying the allegations of the Authority that the film was "contrived and staged and did not picture actual events as represented to the viewers on the [December 5] news broadcast" and that it had not met its fairness doctrine obligations. It states that as a matter of law, the Commission cannot inquire into the truth or falsity or authenticity of news events; that it took all reasonable steps to ensure the filmed events' veracity both before and after the film's first showing; and the events leading up to the film's shooting on December 4, 1972 and its broadcast the following evening indicate why Stone and Schussel, and not licensee's news personnel shot the footage which was later shown on WNEW–TV.

In an affidavit executed on February 15, 1973, Councilman Postel stated that in November 1972, Stone and Schussel came to him to discuss privately what was characterized as a "major scandal" in the operation of the Transit Authority. (Press reports submitted by the licensee disclosed that Postel had acquired a reputation for inquiring into controversial aspects of the business and service operations of various city government agencies, and for that reason the two former Authority employees approached Postel with their story.) Postel also stated that, after reviewing Authority records, he ascertained that excessive amounts of overtime and pension annuities were being paid certain Authority employees. Postel further stated that on or about December 3, 1972, he, Stone and Schussel met with Theodore Kavanau, Vice President and Director of News for the station, and John Roland, a station news reporter, and that the three men developed in detail for Kavanau and Roland the purported abuses occurring on Authority premises as well as the alleged fraud in salary and pension payments. The Postel affidavit asserts that at that time, Stone and Schussel informed the news personnel present that it would be impossible for the station's news people to shoot film on Authority premises and that the sole way to develop the story for a news broadcast was to have authorized Authority personnel shoot any film footage, and that both Roland and Kavanau, after extensive questioning of Stone

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and Schussel, agreed that the two employees should film those events which illumined the purported abuses with a camera supplied by Roland. Postel's affidavit further states that the two potential cameramen were instructed to "film only what [was] observed to be continuing job abuses and irregular personnel practices and to photograph these events as they happened *during regular working hours.*" (Emphasis added). They were instructed further on the operation of the camera and on December 4, 1972, Stone and Schussel shot the film.

Prior to the film's being developed on December 5 and prior to the film's first showing that same day, affidavits executed by WNEW–TV news personnel state that Schussel and Stone were again interrogated at length by Councilman Postel and Messrs. Kavanau and Roland. All three concluded that the events depicted and described as occurring during working hours were authentic representations of fact. The licensee also contends that in addition to this pre-broadcast questioning, Stone and Schussel were questioned at length when the film was shown on December 5, 6 and 12. Stone and Schussel also have executed affidavits attesting that the events depicted in the film were authentic; that they took polygraph tests in which they were questioned regarding the authenticity of those events and the descriptions given those events; that their answers to the questions posed in the polygraph test were judged to be truthful; and that they were subjected to both a Transit Authority investigation into the matter as well as disciplinary hearings on their continued employment status as a result of their participation in the production and broadcast of the film, all of which elicited testimony from them that none of the events depicted were staged or otherwise deliberately distorted.[2]

The licensee does not dispute that the issues raised by the film's broadcast constituted at the time of broadcast controversial issues of local public importance. Licensee asserts, however, that it met its fairness doctrine obligations by seeking the comments of the Authority's management before and after the film's first broadcasts; by offering the Authority use of its studio facilities to produce and film its rebuttal (an offer refused by the Authority); by presenting the Authority's filmed rebuttal as soon as it was received; by broadcasting excerpts of that rebuttal during its regularly scheduled newscasts; by inviting the City's working press to screen the rebuttal prior to its broadcast on December 12, 1972, so that the press would be in a position to make evening deadlines for the morning editions in order to report on the

[2] Stone and Schussel were terminated as employees of the Authority as a result of the finding made by an administrative Hearing Referee, employed by the Authority, that the "knife incident involving the employee, Mr. Hubert Carey, and the sleeping scene, insofar as it portrayed the employee, Mr. Charles Christ, were staged and contrived, as alleged." *Findings and Recommendations, New York City Transit Authority Trial Board,* May 11, 1973, at 4. While we take notice of this finding and the conclusions reached by the Referee, we believe that the finding is inapposite to our conclusions on the issue of deliberate distortion for two reasons: (1) there is no indication that the Referee employed the same criteria as that employed by this Commission to determine whether our policies pertaining to deliberate distortion have been violated; and (2) in any event, the Commission's concern is with whether there is substantial extrinsic evidence that the licensee staged or deliberately distorted the news or knowingly participated in such activities. *Coverage of Democratic National Convention,* 16 FCC 2d 650 (1969). The Commission, of course, has no jurisdiction to challenge or support the finding made by the administrative hearing Referee who presided over the referenced disciplinary proceeding. Additionally, it is appropriate to note here that much of the evidence submitted by both parties to this inquiry does not bear on the conclusions reached herein on the fairness doctrine and deliberate distortion issues.

Authority's rebuttal; and by continuing to cover all aspects of the stories generated by the film's broadcast, including the Authority's disciplinary proceeding against Stone and Schussel, through the months of January, February, March, April and May, 1973. In addition, the licensee assigned reporters who obtained comments of Authority management during the development of news stories generated by the various inquiries. Finally, immediately following the film's first broadcast on December 5, 1972, the station states it arranged to interview union officials who were critical, in negative terms, of the station for showing the film and of Stone and Schussel for filming it. All of this, the licensee contends, shows that it met its obligations under the fairness doctrine by affording a reasonable opportunity in its overall programming for the presentation and discussion of contrasting viewpoints on issues of public importance and controversy.

DISCUSSION

The complaint, response and associated pleadings raise two mutually exclusive issues: (1) whether complainant has submitted the extrinsic evidence necessary for the Commission to consider allegations of deliberate distortion by the licensee of the news and (2) whether, as the Authority alleges, the licensee has failed to provide a reasonable opportunity for the discussion of contrasting viewpoints on controversial issues of public importance in its overall programming. In numerous statements articulating our policies prohibiting the deliberate staging or distortion of the news, we have made it clear that the Commission cannot act appropriately, absent the presence of significant extrinsic evidence which shows that the licensee's principals, or top station or news management directed or ordered the staging, slanting or distortion of the news. *Coverage of Democratic National Convention, supra; Mrs. J. R. Paul*, 26 FCC 2d 591 (1969); *Hunger in America;* 20 FCC 2d 143 (1969); *In the Matter of WBBM-TV*, 18 FCC 2d 124 (1969); *Mr. George P. Tielsch*, —— FCC 2d —— (January 11, 1974). *In Hunger In America, supra*, the Commission held:

> . . . we wish to make our policy in this sensitive area clear. We commend CBS for undertaking this documentary on one of the tragic problems of today. We wish to make it clear that, in the future, we do not intend to defer action on license renewals because of the pendency of complaints of the kind we have investigated here—unless the extrinsic evidence of possible deliberate distortion or staging of the news which is brought to our attention involves the licensee, including its principals, top management or news management. For example, if it is asserted by a newsman that he was directed by the licensee to slant the news, that would raise serious character qualifications of the licensee. . . . However, if the allegations of staging, supported by extrinsic evidence, simply involve news employees of the station, we will, in appropriate cases inquire into the matter, but unless our investigation reveals involvement of the licensee or its management there will be no hazard to the station's licensed status . . . *Id.* at 150.

Furthermore, the Commission has consistently stated that it is not appropriate for this government agency to seek to determine the truth or falsity of news programming and that Section 326 of the Communications Act specifically prohibits the Commission from censoring

any program matter. Rather, it has been the Commission's position that licensees should be encouraged to present robust, wide-open debate on controversial issues such as the issues raised in the WNEW–TV newsfilm challenged here. *Mrs. J. R. Paul, supra.* While there is some question raised by the pleadings filed herein whether certain of the events depicted in the questioned newsfilm were staged or inaccurately described when broadcast, there has been no showing made that the licensee or its top news management directed or ordered any alleged staging, or that it was in any other way involved in staging the news. The licensee offers evidence, moreover, that its top news management and other news personnel took reasonable steps to verify the authenticity of the events depicted in the film, both before and after the film's first broadcast on December 5, 1972. It appears that the licensee made further efforts to determine whether Stone and Schussel accurately described the events portrayed in the film by having both men submit to polygraph tests, which indicated they were telling the truth, and that the licensee was explicit in dictating to Stone and Schussel that only spontaneous events occurring during working hours were to be filmed. In any case, the Authority has not submitted extrinsic evidence showing that the licensee's top news management, or even the licensee's news reporters, ordered distortion or staging of the events depicted in the film. In the absence of such extrinsic evidence, the Commission does not believe it appropriate to inquire further into the Authority's charges that the film was deliberately distorted.

The licensee's compliance with the fairness doctrine turns on whether it afforded a reasonable opportunity, in its overall programming, for the presentation of contrasting views on the controversial issues of public importance raised as a result of the film's broadcast. There is no dispute that the film and subsequent discussions and interviews which were broadcast presented a controversial issue of public importance. The fairness doctrine, however, does not require, as the Authority suggests, that equal time be given the opposing or contrasting viewpoint. *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, (*Fairness Primer*) 29 Fed. Reg. 10416 (1964). The fairness doctrine requires that when a licensee presents programming pertaining to one side of a controversial issue of public importance, it must afford a reasonable opportunity in its overall programming for the presentation of contrasting views. Furthermore, the selection and presentation of specific program matter which discusses such issues are, in the first instance, the responsibilities of the licensee. Thereafter, "the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all other facets of such programming." *Fairness Primer, supra*, at 10416. It is only appropriate for the Commission, when it inquires into allegations that a licensee has not met its fairness doctrine obligations, to determine whether the licensee "can be said to have acted reasonably and in good faith." *Ibid.* When a complainant to the Commission invokes the fairness doctrine, that complainant has

the burden of showing that the licensee's exercise of judgment under the fairness doctrine was unreasonable or in bad faith. *Green* v. *FCC*, 144 U.S. App. D.C. 353, 447, F. 2d 323, 324 (1971). In *Green*, *supra*, the court outlined the limits and application of the doctrine in the following terms:

> As to how the conflicting points of view are presented, a licensee can present conflicting views in any fashion, so long as the balance in format, time, protagonists, etc., meets a test of reasonableness. In addition to achieving a balance in presentation of conflicting views, this rule purports to foster self-regulation, to avoid any implication of censorship by the Commission, and to enable the broadcasters themselves to safeguard their economic interests in allocation of time . . . [U]nder the fairness doctrine identical treatment of both sides of an issue is not necessary, as this would place an onerous and impractical burden on the licensees. A further difference, no individual member of the public has the right of access to the air; the licensees may exercise their judgment as to what material is presented and by whom . . . The fairness doctrine is issue-oriented, and it would be sufficient if each licensee could show that the point of view advocated by (petitioner) had been or was being presented on its station by others.
>
> In our view, the essential basis for any fairness doctrine, no matter with what specificity the standards are defined, is that the American public must not be left uninformed. (447 F. 2d at 328).

On the basis of the evidence submitted by both parties, it appears that the licensee provided a reasonable opportunity for the presentation of contrasting views on the controversial issues of public importance involved here in its overall programming. Thus, the station broadcast the entire twenty-minute Authority rebuttal, presented excerpts from that rebuttal during its regularly scheduled newscasts and went to careful lengths to publicize the broadcast of the rebuttal. In addition, the licensee attempted to elicit comments from Authority officials relative to the Authority's position on the controversial issues and broadcast the Authority's comments in its news programs; presented the position of union officials who represented the transit workers; and, during the months when the controversy was most prominent, reported in its newscast events surrounding the controversy without regard to those events' favorable or negative implications to the position taken by the licensee in the December 5, 1972, newsfilm.

For the reasons set forth herein, no further action on your complaint is warranted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
HON. W. HAROLD DEMARCUS, LARRY J. HOPKINS, AND ARTHUR L. SCHMIDT, CONCERNING THE FAIRNESS DOCTRINE AGAINST STATION WGBY-TV, SPRINGFIELD, MASS.

MARCH 13, 1974.

HON. W. HAROLD DEMARCUS, LARRY J. HOPKINS, AND ARTHUR L. SCHMIDT,
Commonwealth of Kentucky, House of Representatives, Republican Office, Capitol Bldg., Frankfort, Ky.

DEAR SIRS: This is in reply to your letter of February 13, 1974 concerning broadcasts by Kentucky Educational Television (KET) in connection with events in the Kentucky General Assembly.

You stated that "the Kentucky Educational Television has monopolized the television coverage of events in the General Assembly, especially the Governor's speeches, and placed a political bias on each by only interviewing the Legislators picked by the Governor's Press Secretary, Mr. Thomas Preston, for comment following the speeches"; that "Mr. Preston only picked the ones that would not be critical of the Governor"; and that "Consequently, no member of the Republican Leadership of the Kentucky House of Representatives was invited to appear." You stated that you were ". . . writing to register a formal complaint under the Fairness Doctrine . . .", and you requested "equal time" to respond to the Governor's speeches.

We note that in copies of newspaper articles attached to your complaint it was stated that Mr. O. Leonard Press, Executive Director of the Kentucky Educational Television, "conceded . . . that Gov. Wendell Ford's press secretary picked the legislators—including Republicans—to respond to the governor's major policy speeches on KET television . . ."; and that Mr. Press is quoted as stating, "We'll rethink this for the next time."

On February 20, 1974, we received a copy of a letter dated February 14, 1974, which was sent to you by KET in response to your letter of February 13 to the Commission. The letter, signed by Mr. Press, referred to your allegation that ". . . no member of the Republican Leadership of the Kentucky House of Representatives was invited to appear . . ." to comment on and respond to the Governor's speeches on KET. Mr. Press stated that, "[w]hen asked to appear on KET following the Governor's State of the Commonwealth message on January 8, 1974, you refused." KET also stated that you refused to accept an invitation to appear on KET following the Governor's budget message on

January 22, 1974, but stated that you did appear on KET during its coverage of the General Assembly on January 24, 1974, KET further stated that it recognized its responsibility to present contrasting views on controversial issues of public importance, and that, accordingly, you were being offered time to respond to issues raised by others appearing on KET, if you should so desire.

KET denied your request for "equal time," on the ground that no political candidates were involved, and denied your allegation that it had violated the fairness doctrine. KET's letter concluded by responding to your allegation that it had monopolized the television coverage of events in the General Assembly:

> [W]e were certainly not the only station there. Nor have we always been the one to originate . . ., and never have we sought either a monopoly or to supplant another station.

The general question presented by your complaint and by KET's response is whether the coverage of gubernatorial addresses by KET and its member stations presented the discussion of one side of a controversial issue of public importance and thereby obligated KET, under the fairness doctrine, to afford an opportunity for the broadcast of contrasting views.

The Commission is prohibited by Section 326 of the Communications Act from censoring broadcast matter, and it does not attempt to direct broadcasters in the selection or presentation of specific programming.

However, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy, known as the fairness doctrine, does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith. For your further information, we are enclosing a copy of the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance."

Where complaint is made to the Commission, the Commission expects a complainant to submit specific information including: (1) the specific issue or issues of a controversial nature of public importance broadcast (complainant should include accurate summary of the views broadcast and presented by the station or network); (2) the date or dates when the issue or issues were broadcast; (3) the basis for the claim that the issue was a controversial issue of public importance,

either nationally or in the station's local area at the time of the broadcast; (4) reasonable grounds for the claim that the station or network broadcast only one side of the issue in its *overall* programming; (5) copies of correspondence between the complainant and the station or network; and (6) whether the station or network has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting viewpoints on that issue.

On the basis of the information before the Commission, we are not able to conclude that KET's judgment that it had not violated the fairness doctrine was unreasonable. Moreover, your complaint fails to specify with particularity the issue or issues of a controversial nature of public importance which were broadcast. As has been frequently observed, "[to] invoke the fairness doctrine . . . there must exist a controversial issue of public importance on which the licensee has refused to allow a reasonable balanced point of view." *Green* v. *FCC*, 447 F. 2d 323, 327 (D.C. Cir. 1971). Before the Commission can take appropriate action with respect to fairness doctrine complaints it must receive specific information setting forth reasonable grounds for the complainant's conclusion that a licensee in its overall programming has not attempted to present opposing views on controversial issues of public importance. *Allen C. Phelps*, 21 FCC 2d 12 (1969). As the Commission has stated:

> Absent detailed and specific evidence of failure to comply with the requirements of the fairness doctrine, it would be unreasonable to require licensees to disprove allegations such as those made here [general assertions that a licensee has unfairly presented issues on its programs] The Commission's policy of encouraging robust, wide-open debate on issues of public importance would in practice be defeated if, on the basis of vague and general charges of unfairness, we should impose upon licensees the burden of proving the contrary by producing recordings or transcripts of all news programs, editorials, commentaries and discussion of public issues, many of which are treated over long periods of time. *Id.* at 13.

It should also be noted that the Commission has imposed no obligation on licensees to afford spokesmen for one party an opportunity to respond to speeches by public officials of the opposing party and has rejected arguments requesting such requirements. *Senate of Commonwealth of Puerto Rico*, 37 FCC 2d 579 (1972). *In the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, First Report in Docket 19260, 36 FCC 2d 40 (1972). In the proceedings of that first report it had been argued that the responsibility of the licensee under the fairness doctrine should be extended to require that comparable opportunities be made available to opposing spokesmen to comment on the issues raised on any broadcast appearance by any public official, and that the Commission should create a presumption that every broadcast by the President involves a controversial issue of public importance, thereby requiring a licensee to seek out spokesmen with opposing viewpoints and afford them equal opportunities. In rejecting these proposals the Commission stated:

> However well intentioned these arguments are, we believe that increasingly detailed Commission regulation militates against robust, wide open debate. The genius of the fairness doctrine has been precisely the leeway and discretion it

affords the licensee to discharge his obligation to contribute to an informed electorate . . . Thus the argument for flexibility, rather than rigid mechanical rules discussed in *Committee For Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283, 292 (1970) remains persuasive. Applying those principles, we do not believe it appropriate to adopt policies that might well inhibit reports to the electorate by elected officials. Rather, the general fairness approach of facilitating such reports and at the same time insuring the public is reasonably informed concerning the contrasting viewpoints best serves the public interest.

As to your allegation, supported by newspaper clippings, that KET ". . . placed a political bias on . . . [television coverage of gubernatorial addresses] by only interviewing the Legislators picked by the Governor's Press Secretary . . .," this alone would not establish that KET or any station licensee failed to afford reasonable opportunity for the presentation of contrasting views on the issues set forth in the Governor's speeches. While questions are raised by a licensee or network's reliance on administration employees to select spokesmen on the programs about which you are concerned (rather than the network's exercising its own discretion in selecting spokesmen for contrasting views), this is a separate problem from that of failure in any specific instance to comply with the fairness doctrine, and, if the newspaper account of the hearing is correct, Mr. Press indicated an intention to adopt a different policy in the future in selecting spokesmen for opposing views. In any event, a copy of this letter is being sent to KET for its information regarding the responsibility of licensees in selecting spokesmen for contrasting views.

In light of the foregoing, no further action is being taken with respect to your fairness doctrine complaint on the basis of the information thus far supplied. It is hoped, however, that the information herein and the enclosure will serve to explain the broadcast licensees' obligations and the Commission's role in this area of broadcasting.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau

FCC 74-270

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (CRAIG, FORT COLLINS, GREELEY, PUEBLO, STEAMBOAT SPRINGS, VAIL AND WINDSOR, COLO., AND LARAMIE AND TORRINGTON, WYO.)	Docket No. 19663 RM-1895 RM-1896

REPORT AND ORDER

(PROCEEDING TERMINATED)

(Adopted March 13, 1974; Released March 18, 1974)

BY THE COMMISSION:

1. The Commission has before it the Notice of Proposed Rule Making and Memorandum Opinion and Order adopted in this proceeding on December 20, 1972 (38 Fed. Reg. 805) and the comments and reply comments filed in response by Harry P. Brewer, Colorado RG, Inc., and Charles R. Tuma.

2. At issue in this proceeding is the making of additional Class C FM assignments in northern Colorado. When adopting the earlier document the Commission concluded that the making of three new Class C assignments in this area was not warranted but that two such assignments might well be. Thus, comments were invited on such an approach and on the choice to be made among the three communities vying for assignments: Greeley, Fort Collins and Windsor, Colorado. To accomplish the proposed assignments, other changes in the FM Table would be required effecting a substitute assignment in Craig, Colorado, and others in Laramie and Torrington, Wyoming. Specifically, the Notice proposed assigning Channel 241 to Greeley, Colorado, and Channel 256 to Fort Collins or Windsor, Colorado. No counterproposals have been advanced urging that the assignments be made to other communities, so the choice before us is whether to make the two assignments and if so, where to make them. All of the parties have confirmed their intention to proceed should these channels be assigned.

3. These three communities are in the same general area so that the use of each channel would bring excellent reception service to all of them. They extend on a line running northwest to southeast, with Windsor in the center and the others 11 miles away from it, Fort Collins to the northwest and Greeley to the southeast. The information submitted in response to the Notice confirms the view earlier expressed tentatively, namely, that two additional assignments are needed in this fast growing area. Since the assignments could be made without

serious preclusionary consequences and each channel could be used consistent with applicable spacing and other engineering requirements, we shall proceed to assign Channels 241 and 256.

4. Both Fort Collins and Greeley are substantial communities that have existing full-time radio service. Windsor, on the other hand, is a small community that has only a daytime AM station. Each of the parties urges an approach that responds to its needs while in effect providing the other two with the "left-overs". For the most part, the significant facts are not in dispute, so we need not specifically set forth all of the separate arguments of the parties. Instead, we shall make our own evaluation of the respective needs of the communities.

5. Fort Collins, the largest of the three communities, had a 1970 population of 43,337. It has two occupied FM channels and two AM stations—one full-time and one daytime-only. Ordinarily, a community of less than 50,000 population is assigned no more than two channels, but Fort Collins' fast growth pattern indicates that it may have reached 50,000 already. Even if it has not, it soon would be expected to, and we need to take such facts into consideration when making assignments. We are also mindful of the importance of Fort Collins in the surrounding area and its position as seat of Larimer County. Communities of 50,000 to 100,000 are normally assigned 2 to 4 channels, and we are of the view that Fort Collins should not be precluded from obtaining a third FM assignment because its 1970 population was below the dividing line.[1]

6. Greeley is not quite as large as Fort Collins, having a population of 38,902, but unlike Fort Collins, it has only one FM assignment. It also has two full-time AM stations. A second FM assignment would be in keeping with its size and position as county seat. Windsor, on the other hand, has a population of only 1,564. In its favor is the lack of an FM assignment and the lack of a local full-time radio facility. However, it is indeed small, and particularly where a Class C channel is involved,[2] a question arises about the appropriateness of such an assignment. The parties have cited cases on behalf of or in opposition to making a Class C assignment to a community of this size. Charles R. Tuma (Fort Collins proponent) referred to our general policy to assign Class C channels to larger communities which began with the Further Notice of Proposed Rule Making in the FM allocations proceeding (FCC 62–867) and to the Third Report and Memorandum Opinion and Order in that proceeding, 23 R.R. 1859 (1963). It was Tuma's view that Windsor was neither large enough in itself, nor was it in the category of a small community needing to reach a large surrounding rural area in order to survive. He also pointed to the denial of a requested assignment at *Hartselle, Alabama*, 22 R.R. 2d 1653, 1660, because, *inter alia*, it was in the same county as and received

[1] In his petition in support of an additional assignment for Fort Collins, Charles R. Tuma added the student body at Colorado State University to the listed population to get a total of over 60,000 residents. This is incorrect, for as in previous censuses, students are included in the population figures for the city where the college is located. However, as described above, we do not need to rely on such an increment in Fort Collins' population figure.

[2] A Class C channel is involved because the only Class A assignment which could be made would require a site 11 miles from Windsor. From this site, a Class A station would be unable to provide the requisite signal level to Windsor.

service from another larger community. Harry P. Brewer, on behalf of Windsor's needs, cited the Commission policy to give major priority to a first FM service as for example in *Crystal River, Florida*, FCC 73–158. While acknowledging the usual practice of assigning Class C channels to larger communities, he pointed out that the Commission has assigned Class C channels to smaller communities where circumstances warrant, as for example in *Harrisonville, Missouri*, 6 F.C.C. 2d 239, 8 R.R. 2d 1724 (1967). Because of the wide disparity in factual situations, there are instances in which varying approaches have been followed. Each of the views now before us has some support in the cases, and it is true that we could evaluate matters so as to finally adjudicate the position of Windsor without a hearing on applications. However, this is a question which in this instance is best resolved in a hearing on competing applications. If we assigned the channels to Greeley and Fort Collins, the Windsor applicant could file for either and have it arguments about Windsor's needs heard. While there are some restrictions on where the transmitter sites for the two channels would have to be located, appropriate sites appear to be available from which required city coverage could be provided to either Fort Collins and Windsor on the one hand or to Greeley and Windsor on the other. Mr. Brewer mentions the *McKenzie, Tennessee* FM proceeding, 5 R.R. 2d 1530 (1965), as indicating that the Commission is not required to leave matters for resolution based on the applications which are filed. The point is valid enough but inapplicable here. Where a choice can better be made in a rule making proceeding, we are not precluded from so acting, but the reverse is also true. If it is better to defer matters, that possibility is also open to us. Unlike the *McKenzie* case where the larger community had no FM assignment and the smaller one already did, the choice is not so easily made on the showings now before us. There are arguments on both sides that need further airing and this is only efficiently possible in a hearing on competing applications.

7. If Windsor were given either assignment, it would work an absolute preclusion for one of the other communities. This is the case because the rules do not permit the removal of a channel for use in a listed community. Windsor is not listed in the FM Table, so it is not so precluded. There is one final point in connection with the use of the channel at Windsor which needs to be mentioned. The charge has been made considering the site a Windsor station would use and the smallness of Windsor in comparison to other populations which would be served by a Class C station, a question would exist about whether the proposal in fact would realistically be for another larger community instead. See *Berwick Broadcasting Corp.*, 17 R.R. 2d 884 (1969). Charles R. Tuma asserted that the site would have to be about 11 miles northeast of Windsor and that Fort Collins is 11 miles northeast of Windsor. The fact is that Fort Collins is 11 miles northwest of Windsor, not northeast. Even so, the site would permit a station to provide a city-grade signal to Windsor and Fort Collins. This is a question best answered in a hearing, and in any event, is not one we need to consider now in view of our decision on how to proceed. As to the viability of Windsor, both Tuma and Brewer cite the *Baytown, Texas* TV as-

signment case, 11 F.C.C. 941, 12 R.R. 2d 1581 (1968). Tuma reads the case as indicating that the Commission will not assign a channel to a small community where the facts tend to indicate that the station would realistically serve a larger community. Brewer contends that where the Commission has doubts on this score, it will require a showing, and since we did not, that the question did not arise. For a number of reasons television precedents, including this one, are not always determinative in FM allocations. Even if it were directly pertinent, this matter is incorporated under consideration of a possible *Berwick* issue as described above and does not require separate or different treatment here.

8. We shall assign Channel 241 to Greeley, Colorado, and Channel 256 to Fort Collins, Colorado. This will necessitate a change in Channel 236 at Craig, Colorado, for which Channel 273 will be substituted and a change in Channel 257A at Torrington, Wyoming, for which Channel 252A will be substituted. These channels are vacant as is Channel 241 at Laramie, Wyoming for which Channel 236 will be substituted.[3] Channel 255 at Laramie is not vacant, but the permittee accepted its construction permit subject to the substitution of Channel 275, as is being done. Therefore, a show cause order need not be issued. Instead, we shall order the change in channel and shall issue a modified permit specifying Channel 275.

9. Accordingly, IT IS ORDERED, pursuant to authority contained in Sections 4(i), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, that the FM Table of Assignments (Section 73.202(b)) of the Commission's Rules IS AMENDED effective April 29, 1974, insofar as the cities listed are concerned to read as follows:

City:	*Channel No.*
Craig, Colo	229, 273
Fort Collins, Colo	227, 256, 300
Greeley, Colo	222, 241
Laramie, Wyo	236, 275
Torrington, Wyo	252A

10. IT IS FURTHER ORDERED, That the outstanding permit for Channel 255 at Laramie, Wyoming, IS MODIFIED to specify Channel 275.

11. IT IS FURTHER ORDERED, That the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[3] The applicant now seeking use of Channel 241 at Laramie will need to amend its application to specify the new channel.

FCC 74-243

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606(b), TABLE OF ASSIGNMENTS, TELEVISION BROADCAST STATIONS. (BOCA RATON, FLA.; ARDMORE, HUGO, AND LAWTON, OKLA.; AND LONGVIEW, TEX.)	Docket No. 19964

NOTICE OF PROPOSED RULEMAKING

(Adopted March 7, 1974; Released March 15, 1974)

BY THE COMMISSION:

1. Notice of proposed rulemaking is hereby given in the above-entitled matter.

2. In a First Report and Order in Docket No. 18261, adopted May 20, 1970, the Commission established a plan under which licensees in the land mobile radio services are allowed to share a maximum of two of the lower seven UHF television channels (Channels 14 through 20) in and near the ten largest urban areas of the country (23 F.C.C. 2d 235). In a Fourth Further Notice of Proposed Rulemaking adopted today in the same docket No. 18261 (Fed. Reg. —), is proposed to extend the frequency sharing plan to the urban areas of Miami, Florida, and Houston and Dallas-Fort Worth, Texas. However, the proposal would allow the sharing of only one channel in each of these areas. Channel 14 would be shared at Miami, Channel 17 at Houston, and Channel 16 at Dallas-Fort Worth. The reasons for this proposed extension of the sharing plan are set forth in the Fourth Further Notice mentioned above and will not be repeated here.

3. If the proposed plan is adopted, it would not affect usage of currently assigned UHF channels in the vicinity of Houston. However, as to Miami, land mobile users in the area could not afford appropriate protection against interference to an occupant of Channel *14 at Boca Raton (presently unoccupied and unapplied for). Similarly, there are UHF channels, presently unoccupied and unapplied for, at Longview, Texas (Channel 16), and the Oklahoma communities of Ardmore (Channel *17), Hugo (Channel *15), and Lawton (Channel 16), to which land mobile users at Dallas-Fort Worth could not afford adequate protection if the channels were to become occupied. Because of this, we are proposing to freeze the aforementioned channel assignments at the communities mentioned, in the event that the proposed sharing plan is adopted. Moreover, in view of the fact that interest in activating some of these channels has been demonstrated, we think it in the public interest to propose replacement channels for them.

4. By freezing the channels, we mean that we shall not accept applications for construction permits for new television facilities on them, and that we shall not accept requests for changes in the table of assignments that would involve moving an assignment of an affected channel to another location within 212 miles, co-channel, and 140 miles, adjacent channel, of the geographic centers of the three aforementioned urbanized areas as set forth in the proposed amendment of Table G, Section 89.123 of the Rules, appearing in Appendix A to the Fourth Further Notice of Proposed Rulemaking adopted today in Docket No. 18261.

5. In view of the foregoing, we are proposing to make the following amendments to the Television Table of Assignments, Section 73.606(b) of the Commission Rules, if the sharing plan proposed in Docket No. 18261 is adopted:

City	Channel No.	
	Present	Proposed
Boca Raton, Fla	*14	[1] *14, *62
Ardmore, Okla	*17	[1] *17, *28
Hugo, Okla	*15	[1] *15, *48
Lawton, Okla	16	[1] 16, 45
Longview, Tex	16	[1] 16, 51

[1] Following the decision in docket No. 18261, channels so indicated will not be available for television use until further action by the Commission.

6. Authority for the proposed amendments is found in Sections 4(i), 303 (g) and (r), and 307(b) of the Communications Act of 1934, as amended.

7. Pursuant to applicable procedures set out in Section 1.415 of the Commission's Rules and Regulations, interested parties may file comments on or before April 22, 1974, and reply comments on or before May 6, 1974. All submissions by parties to this proceeding, or persons acting on behalf of such parties, must be made in written comments, reply comments, or other appropriate pleadings.

8. In accordance with the provisions of Section 1.419 of the Rules and Regulations, an original and 14 copies of all comments, reply comments, pleadings, briefs, and other documents shall be furnished the Commission. These will be available for public inspection during regular business hours in the Commission's Public Reference Room at its Headquarters, 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-88

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
GREAT SOUTHWEST MEDIA CORP., ARKADELPHIA, ARK.	Docket No. 19892 File No. BPH-8240
ARKADELPHIA BROADCASTING CO., ARKADELPHIA, ARK.	Docket No. 19894 File No. BPH-8327
For Construction Permits for New FM Station	

MEMORANDUM OPINION AND ORDER

(Adopted March 8, 1974; Released March 12, 1974)

BY THE REVIEW BOARD:

1. Arkansas Television Company filed on January 4, 1974, a request to enlarge the hearing issues in this proceeding.[1] At the time of filing, petitioner was not a party, but on January 4, it also filed a petition for leave to intervene with the Administrative Law Judge assigned to this case. In an order released February 11, 1974, the Presiding Judge denied the petition to intervene. Since only parties are authorized by Section 1.229 of the Rules to file petitions to enlarge issues, the instant request must be dismissed. *Cf. Lamar Life Broadcasting Company*, FCC 74R-11, —— FCC 2d ——, released January 11, 1974.

2. Accordingly, IT IS ORDERED, That the request to enlarge issues filed by Arkansas Television Company on January 4, 1974, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[1] Great South Media Corporation filed an answer on January 23, 1974; the Broadcast Bureau filed an opposition on February 1, 1974; petitioner filed a reply on February 27, 1974.

FCC 74-209

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request for Order To Show Cause To Be Directed Against	
HARRISBURG CABLEVISION, MIDDLETOWN, PA.	Docket No. 19949 CSC-44; PA433
HARRISBURG CABLEVISION, HIGHSPIRE, PA.	Docket No. 19950 CSC-45; PA428
HARRISBURG CABLEVISION, STEELTON, PA.	Docket No. 19951 CSC-46; PA438
HARRISBURG CABLEVISION, LOWER PAXTON TOWNSHIP, PA.	Docket No. 19952 CSC-47; PA431
HARRISBURG CABLEVISION, WEST HANOVER TOWNSHIP, PA.	Docket No. 19953 CSC-48; PA36A
HARRISBURG CABLEVISION, SWATARA TOWNSHIP, PA.	Docket No. 19954 CSC-49; PA440
HARRISBURG CABLEVISION, LOWER SWATARA TOWNSHIP, PA.	Docket No. 19955 CSC-50; PA430

ORDER TO SHOW CAUSE

(Adopted February 27, 1974; Released March 8, 1974)

BY THE COMMISSION:

1. On March 28, 1973, Gateway Communications, Inc., licensee of Station WLYH-TV, Lancaster, Pennsylvania, filed a "Petition for Issuance of Order to Show Cause" requesting the Commission to issue an Order to Show Cause against Harrisburg Cablevision, operator of cable television systems at Middletown, Pennsylvania, and 21 other communities in and around Harrisburg, Pennsylvania, for alleged violation of the signal carriage and network program exclusivity provisions of the Commission's rules.[1] While Harrisburg Cablevision

[1] Relevant Sections 76.61 (incorporated by Section 76.63, applicable to the second fifty major markets) and 76.91 of the Commission's Rules provide, in pertinent part, as follows:

"76.61

"(a) Any such cable television system may carry, or on request of the relevant station licensee or permittee, shall carry the signals of: (1) Television broadcast stations within whose specified zone the community of the system is located, in whole or in part: *Provided, however,* That where a cable television system is located in the designated community of a major television market, it shall not carry the signal of a television station licensed to a designated community in another major television market, unless the designated community in which the cable system is located is wholly within the specified zone (see § 76.5(f)) of the station, except as otherwise provided in this section; (2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part; (3) Television translator stations with 100 watts or higher power serving the community of the system and, as to cable systems that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the system. In addition, any cable system may elect to carry the signal of any noncom-

104-030—74——4

serves 22 communities, located in three southern Pennsylvania counties, and all within the Harrisburg-Lancaster-York, Pennsylvania, television market (#57), Gateway's petition was filed only with respect to seven communities allegedly enclosed by the predicted principal community contour of Station WLYH–TV. Operating from a single headend, this conglomerated system is able to serve over 32,000 subscribers—more than 8,500 in the seven captioned communities—with the following television broadcast signals:

WHP–TV (CBS) Harrisburg, Pennsylvania.
WGAL–TV (NBC) Lancaster, Pennsylvania.
WTPA (ABC) Harrisburg, Pennsylvania.
WLYH–TV (CBS) Lancaster, Pennsylvania.
WSBA–TV (CBS) York, Pennsylvania.
WITF–TV (Educ.) Hershey, Pennsylvania.
WBAL–TV (NBC) Baltimore, Maryland.
WJZ–TV (ABC) Baltimore, Maryland.
WMAR–TV (CBS) Baltimore, Maryland.
WKBS–TV (Ind.) Philadelphia, Pennsylvania.
WPHL–TV (Ind.) Philadelphia, Pennsylvania.
WTAF–TV (Ind.) Philadelphia, Pennsylvania.
KYW–TV (NBC) Philadelphia, Pennsylvania.
WPVI–TV (ABC) Philadelphia, Pennsylvania.
WCAU–TV (CBS) Philadelphia, Pennsylvania.
WTTG (Ind.) Washington, D.C.

Gateway argues that Cablevision is operating in violation of our signal carriage rules since it does not afford it full-time carriage, even though Station WLYH–TV is licensed to one designated community of the hyphenated market, and is therefore a "must-carry" signal.

2. On April 17, 1973, Cablevision filed an "Opposition to Petition for Issuance of Order to Show Cause: Petition for Temporary Special Relief." With respect to the Show Cause proceeding, Cablevision states that while CBS affiliates WHP–TV, Harrisburg, and WSBA–TV, York, Pennsylvania, are carried full-time, WLYH–TV—which is also a CBS affiliate—". . . is also carried on the system in situations when it is carrying special programming of particular interest." Cablevision argues that Gateway was dilatory in making its carriage request. Moreover, Cablevision asserts that the market CBS stations

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mercial educational translator station; (4) Television broadcast stations licensed to other designated communities of the same major television market (Example: Cincinnati, Ohio-Newport, Ky., television market); (5) Commercial television broadcast stations that are significantly viewed in the community of the system See § 76.54."

"76.91

"(a) Any cable television system operating in a community, in whole or in part, within the Grade B contour of any television broadcast station, or within the community of a 100-watt or higher power television translator station, and that carries the signal of such station shall, on request of the station licensee or permittee, maintain the station's exclusivity as an outlet for network programming against lower priority duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in §§ 76.93 and 76.95."

"(b) For purposes of this section, the order of priority of television signals carried by a cable television system is as follows: (1) First, all television broadcast stations within whose principal community contours the community of the system is located, in whole or in part; (2) Second, all television broadcast stations within whose Grade A contours the community of the system is located, in whole or in part; (3) Third, all television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part; (4) Fourth, all television translator stations with 100 watts or higher power, licensed to the community of the system."

place contours of equal priority over its systems, and that since it is impossible to split signals on its system to provide different service to the various communities served, grant of Gateway's request would mean that 25% of its channels would carry CBS programs during network hours. Cablevision claims this would undercut the Commission's goal of fostering diversity of expression and waste valuable channel capacity. Additionally, Cablevision seeks special relief to "prevent needless duplication of programming" and "reflect market realities that would clearly serve the public interest." To accomplish this, Cablevision requests temporary waiver of Section 76.91 of the Commission's Rules until its channel capacity is expanded in accordance with Section 76.251 of the Rules.[2] In the interim, Cablevision wishes to extend program exclusivity only to WHP–TV, and to carry only the non-network programs of the other CBS market affiliates.

Cablevision observes that only WHP–TV is significantly viewed in the systems' three counties and a) details its view of the history of the Harrisburg-Lancaster-York market; b) claims that neither WSBA–TV nor WLYH–TV would have been entitled to carriage in a "normal 'footnote 69' situation"[3]; and c) asserts that affording a CBS affiliate exclusive carriage on systems around its community of license, at least for network programming, would serve the public interest.

Upon completion of the systems' reconstruction, Cablevision proposes to afford each of the three CBS affiliates full-time carriage. In the interim, Cablevision suggests that space made available on the two channels which otherwise would carry WSBA–TV and WLYH–TV ". . . could be used for presentation of non-network programming from other stations whose carriage is authorized, locally originated programming, or access services."

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[2] Section 76.251 of the Commission's Rules provides, in pertinent part, as follows:

"(a) No cable television system operating in a community located in whole or in part within a major television market, as defined in § 76.5, shall carry the signal of any television broadcast station unless the system also complies with the following requirements concerning the availability and administration of access channels: (1) *Minimum channel capacity.* Each such system shall have at least 120 MHz of bandwidth (the equivalent of 20 television broadcast channels) available for immediate or potential use for the totality of cable services to be offered; (2) *Equivalent amount of bandwidth.* For each Class I cable channel that is utilized, such system shall be capable of providing an additional channel, 6 MHz in width, suitable for transmission of Class II or Class III signals (see § 76.5 for cable channel definitions); (3) *Expansion of access channel capacity.* Whenever all of the channels described in subparagraphs (4) through (7) of this paragraph are in use during 80 percent of the weekdays (Monday–Friday) for 80 percent of the time during any consecutive 3-hour period for 6 consecutive weeks, such system shall have 6 months in which to make a new channel available for any or all of the above-described purposes;"

* * * * * * *

"(c) The provisions of this section shall apply to all cable television systems that commence operations on or after March 31, 1972, in a community located in whole or in part within a major television market. Systems that commenced operations prior to March 31, 1972, shall comply on or before March 31, 1977: *Provided, however,* That, if such systems begin to provide any of the access services described above at an earlier date, they shall comply with paragraph (a)(9), (10), and (11) of this section at that time: *And provided, further,* That if such systems receive certificates of compliance to add television signals to their operations at an earlier date, pursuant to § 76.61 (b) or (c), or § 76.63(a) (as it relates to § 76.61 (b) or (c)), for each such signal added, such systems shall provide one (1) access channel in the following order of priority—(1) public access, (2) education access, (3) local government access, and (4) leased access—and shall comply with the appropriate requirements of paragraphs (a)(4)–(7) and (a)(9)–(11) of this section with respect thereto."

Cablevision's pending applications for Certificates of Compliance (CAC–3276—CAC–3297) indicate that it does not expect that system expansion will be completed before early or mid-1976.

[3] I.e., Fn. 69, *CATV,* 2 FCC 2d 725, 786 (1966).

3. Gateway, in response argues: a) that a proper request for full-time carriage cannot be refused on the ground that it should have been made earlier; b) that the affiliation of three market stations with CBS was not an "accident" but done with the full knowledge and concurrence of the Commission in an effort to strengthen three UHF stations citing *Amendment of Section 3.606 Table of Assignments, Television Broadcast Stations (Lebanon and Lancaster, Pennsylvania.)* FCC 62–1167, 24 RR 1564 (1962); and c) that the signal carriage provisions of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, were adopted to help equalize competition between stations in hyphenated markets and to assure that all such stations will have access to cable subscribers in the market, and *vice versa*. Additionally, Gateway attacks Cablevision's assertion that it should be permitted to reject the network programming of WLYH–TV and WSBA–TV with the contention that Cablevision can rebuild its systems now in order to accommodate all authorized signals and to provide full access services.

4. Susquehanna Broadcasting Co., licensee of Station WSBA–TV, York, takes no position with respect to Gateway's request for Order to Show Cause, but does urge continued full-time carriage of WSBA–TV. Susquehanna also opposes Cablevision's petition for special relief. In the event waiver of Section 76.91 of the Rules is granted, Susquehanna asks that the Commission extend the same relief to other cable systems whose carriage includes two or more market signals of equal priority and with similar network affiliations. (Susquehanna operates nine cable systems at York and eight surrounding Pennsylvania communities and has stated its desire that WSBA–TV be afforded exclusivity protection over all other CBS affiliates carried on its systems).

5. Cablevision's "Reply to Opposition" filed June 12, 1973, in response to Gateway contends that immediate reconstruction of the systems is technically and economically impossible, that reconstruction has already begun, but insists that until completed, affording WLYH–TV full-time carriage will reduce the range of program choices available to subscribers, disrupt viewing patterns, and adversely affect the revenues available to fund its channel expansion and reconstruction. Finally, Cablevision reiterates its request for temporary relief in order to delay full-time carriage of WLYH–TV and WSBA–TV on the ground that program diversity and protecting subscribers viewing habits outweighs any need to help equalize competition between the three CBS affiliates.

6. As stated above, all of Cablevision's systems lie within the Harrisburg-Lancaster-York, Pennsylvania market. In addition, much of the conglomerate is enclosed by specified zone of Station WLYH–TV. Pursuant to Section 76.63 of the Commission's Rules (incorporating Section 76.61) Station WLYH–TV is a "must-carry" station and, following a proper request for carriage, must be added to the systems' carriage. A proper request has been made, and Cablevision has not presented any unusual circumstances which excuse a

violation of the Rules; we conclude that Cablevision must carry Station WLYH–TV on the captioned systems. (See *Staunton Video Corporation*, FCC 73–1005, 42 FCC 2d 1119 (1973)).[4] However, we believe some relief from our exclusivity rules is warranted. While all the Harrisburg Cablevision systems operate from a common headend and lie within the predicted Grade A contours of all three CBS affiliates licensed to this market, a number of the cable communities appear to be enclosed by only one or two of the stations' principal community contours. Therefore, in some of these communities the three CBS affiliates are not of equal priority. Requiring literal compliance with our exclusivity rules would, in this situation, place an unwarranted burden on the operator of the Cablevision systems. The public interest will be served if a partial waiver of our network exclusivity rules is granted, to the extent that one CBS market affiliate need not be accorded priority over the other market affiliates on the Cablevision systems. The signals of three stations, of course, will be protected against simultaneous duplication from distant CBS affiliates.

In view of the foregoing, the Commission finds that issuance of the requested Order to Show Cause is consistent with the public interest; that grant of Cablevision's request for temporary special relief would not be consistent with the public interest; and that partial waiver of Section 76.91 of the Commission's Rules would be consistent with the public interest.

Accordingly, IT IS ORDERED, That waiver of Section 76.91 of the Commission's Rules IS GRANTED to the extent reflected above.

IT IS FURTHER ORDERED, That, pursuant to Sections 312 (b) and (L) and 409 (a) of the Communications Act of 1934, as amended, 47 U.S.C. 312 (b) and (c) and 409 (a), Harrisburg Cablevision IS DIRECTED TO SHOW CAUSE why it should not be ordered to cease and desist from further violation of Section 76.63 of the Commission's Rules and Regulations on its cable television systems at Middletown, Highspire, Steelton, Lower Paxton Township, West Hanover Township, Swatara Township, and Lower Swatara Township, Pennsylvania.

IT IS FURTHER ORDERED, That Harrisburg Cablevision, IS DIRECTED, to appear and give evidence with respect to the matters described above at a hearing to be held at Washington, D.C., at a time and place before an Administrative Law Judge to be specified by subsequent Order, unless the hearing is waived, in which event a written statement may be submitted.

IT IS FURTHER ORDERED, That Gateway Communications, and Chief, Cable Television Bureau, ARE MADE parties to this proceeding.

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[4] We note that Gateway's request for carriage addressed only the seven captioned communities. As stated in the foregoing, the conglomerate operates from one headend and apparently is not capable of delivering different programming to separate systems. While our Order to Show Cause will be directed at only seven systems, we realize that future compliance with a subsequent Order by the Administrative Law Judge may require similar carriage on the remaining systems. Station WLYH–TV is already authorized for all 22 systems (and, it appears, has been carried from time to time) so that additional certification will be unnecessary.

IT IS FURTHER ORDERED, That the Secretary of the Commission shall send copies of this Order by Certified Mail—return receipt requested—to Harrisburg Cablevision.

IT IS FURTHER ORDERED, That the request for special relief, filed April 17, 1973, by Harrisburg Cablevision, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-197

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PROPOSALS FOR NEW OR REVISED CLASSES OF INTERSTATE AND FOREIGN MESSAGE TOLL TELEPHONE SERVICE (MTS) AND WIDE AREA TELEPHONE SERVICE (WATS)	Docket No. 19528

MEMORANDUM OPINION AND ORDER

(Adopted February 27, 1974; Released February 28, 1974)

BY THE COMMISSION:

1. We have before us a "Motion to Vacate the Joint Board" filed by the National Retail Merchants Association, (hereinafter NRMA), in which we are requested not only to disqualify the four present State Commission members of the Joint Board which we established in this proceeding on June 16, 1972 (35 FCC 2d 539) but in which we are also requested not to select any other State Commission members to serve on the Board in lieu of the present Commissioners.

2. NRMA states in support of its Motion that the State Commissioners now on the Board will be sitting in a decisionmaking or adjudicatory capacity; that three of these four Commissioners are members of the Communications Committee of the National Association of Regulatory Commissioners (NARUC); that this NARUC Committee is in the midst of conducting an unofficial investigation into the economic impact on telephone subscribers resulting from the interconnection of subscriber-provided equipment to the public switched network; that this activity is duplicative of the issue currently or prospectivly before the Joint Board; that a decision of the NARUC Committee is scheduled to be made by April 19, 1974, well in advance of any Recommended Decision of the Joint Board; that, although one of the present State Commissioners is not a member of the NARUC Communications Committee, one of his fellow-Commissioners is a member of the NARUC Committee; and that the mere removal of the four present State Commissioners and the substitution of any or all other State Commissioners, not presently on the NARUC Communications Committee, would not resolve the question of the integrity of the Joint Board process. NARUC filed a pleading in opposition to the NRMA Motion.

3. We find the NRMA motion to be completely without merit, and shall deny it. NRMA's allegations of fact, taken as correct for our purposes herein, do not support any contention that the integrity of any of the four State members of the Board is compromised in any way. The mere fact that three of the four State members are also

members of an NARUC Committee which is conducting a fact-finding investigation of the alleged economic or other effects of interconnection is not sufficient to warrant the conclusion that these members have so pre-judged the issues before the Joint Board that they cannot continue to serve thereon. No evidence has been presented by NRMA which would support either an allegation that any of the three members has reached any conclusion on the issues herein; or that they may reach any conclusions as a result of the NARUC Committee investigation which would be inconsistent with their participation in the Joint Board proceeding. We cannot assume, as NRMA would have us do, that the three State Commissioners on the NARUC Committee will make decisions or formulate positions on the basis of the NARUC proceeding that would make it improper for them to continue to serve on the Joint Board. Furthermore, the contention that the remaining State Commission Member of the Board is disqualified merely because he happens to be associated with a State Commissioner who is a member of the investigating NARUC Committee, is so patently faulty as to warrant no further discussion. Finally, although NRMA's basic claim is that the four State Commissioners now on the Board should be disqualified because of their nexus to one particular NARUC Committee, NRMA contends that no other State Commissioner can sit on the Board even though there are many other such Commissioners that are not members of the NARUC Committee. NRMA cites no facts and provides no rationale to support its bare conclusion that all other State Commissioners are disqualified to sit on the Joint Board.

4. Accordingly, IT IS ORDERED, that the Motion of NRMA to vacate the Joint Board IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-95

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
ITAWAMBA COUNTY BROADCASTING CO., INC., FULTON, MISS.	Docket No. 19838 File No. BPH-8028
AUBREY FREEMAN, T/A TOMBIGBEE BROADCASTING CO., FULTON, MISS.	Docket No. 19839 File No. BPH-8189
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1974; Released March 15, 1974)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Itawamba County Broadcasting Company, Inc. (Itawamba) and Tombigbee Broadcasting Company (Tombigbee) for authorization to construct a new FM broadcast station in Fulton, Mississippi. The applications were designated for hearing on a standard comparative issue by Order of the Chief, Broadcast Bureau, acting pursuant to delegated authority, 38 FR 28587 published October 15, 1973. Now before the Review Board is a petition to enlarge issues, filed February 5, 1974, by Tombigbee,[1] requesting the addition of a so-called "harassment" issue against Itawamba.

2. Tombigbee's petition arises from a petition to enlarge issues, filed October 29, 1973, by Itawamba against Tombigbee wherein Itawamba alleged that Tombigbee had, *inter alia*, misrepresented facts to the Commission in its application.[2] In support of its allegations, Itawamba submitted 27 affidavits obtained from persons allegedly contacted by Tombigbee in connection with its surveys of community leaders and members of the general public. Tombigbee now alleges that Itawamba coerced some of the affiants "into signing the original affidavits stating that they had not been contacted by Tombigbee" and also recontacted some of the affiants when Itawamba learned that Tombigbee was conducting its own interviews. In support, Tombigbee alleges that Olvie E. and Ivous T. Sisk, Itawamba's principals, contacted "W. W. 'Ben' Mabus" and threatened to "subpoena him and carry him to Washington," that the Sisks persuaded "Mrs. O. K. McFerrin" not to sign an affidavit concerning an interview made by Tombigbee, and that the Sisks forced their way into the house of

[1] Also before the Board are: (a) opposition, filed February 21, 1974, by Itawamba; (b) opposition, filed February 26, 1974, by the Broadcast Bureau; and (c) reply, filed March 5, 1974, by Tombigbee.

[2] In a companion document, adopted this date, the Board is granting Itawamba's petition and adding misrepresentation and *Suburban* issues against Tombigbee.

"Paulette Nichols" and advised her that she would be helping a friend by signing an affidavit that she had not been contacted by Tombigbee.[3] Tombigbee also states that Mr. Freeman "saw the Sisks in the areas in which he [Freeman] was seeing people." Finally, as good cause, Tombigbee states that it waited to file its petition until Itawamba filed its reply pleading to see if Itawamba justified its conduct in the reply.

3. The Review Board agrees with Itawamba and the Broadcast Bureau that the requested issues should be denied. Initially, the Board is of the view that Tombigbee has not shown good cause for the late filing of its petition. See *RKO General, Inc.* (*WNAC–TV*), 42 FCC 2d 469, 28 RR 2d 289 (1973). Tombigbee had the information available to it as of December 13, 1973, when it filed its opposition to Itawamba's petition to enlarge issues, but waited approximately two months to file the instant petition. In addition, the requested issues do not, in our view, meet the *Edgefield-Saluda* test [4] because the likelihood of proving the allegations are not so substantial as to outweigh the public interest benefits inherent in the orderly and fair administration of the Commission's business. See *RKO General, Inc.* (*WNAC–TV*), *supra*. The Board believes that Tombigbee's petition suffers from another fatal procedural defect in that it is based on the "hearsay" statements of Freeman and Mathis and not supported by "affidavits of a person or persons having personal knowledge thereof" as required by Commission Rule 1.229(c).[5] See *Eastern Broadcasting Corp.*, 29 FCC 2d 472, 475, 21 RR 2d 1147, 1150 (1971); *Pleasant Broadcasting Co.*, 22 FCC 2d 191, 194, 18 RR 2d 689, 692 (1970). Finally, on the merits, the Board is of the view that the affidavits of Olvie and Ivous Sisk, attached to Itawamba's opposition, sufficiently rebut Tombigbee's allegations of harassment and coercion. The Board also believes that the pleadings do not reflect that the investigative techniques employed by Itawamba were unreasonable or were not "reasonably related to the objectives of the proceeding itself." *Chronicle Broadcasting Co.*, 19 FCC 2d 240, 245, 16 RR 2d 1014, 1019 (1969). Compare *WIOO, Inc.*, —— FCC 2d ——, 28 RR 2d 685 (1973). In light of the above, the Board will deny the requested issues.

4. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed February 5, 1974, by Tombigbee Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

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[3] Tombigbee relies upon affidavits from Aubrey Freeman, a Tombigbee principal, and Ralph Mathis, a former Tombigbee principal, submitted with its December 13, 1973 opposition to Itawamba's October petition, to substantiate these allegations. Tombigbee does not supply affidavits from any of the interviewees, themselves, to support the allegations, however.

[4] *The Edgefield-Saluda Radio Company*, 5 FCC 2d 148, 8 RR 2d 611 (1966).

[5] As the Bureau states in its opposition: "The only fact of which Freeman and Mathis have personal knowledge is that the Sisks were in Fulton, Mississippi at the same time as they were. Freeman and Mathis neither participated in or observed any of the incidents Tombigbee claims constituted harassment and coercion."

FCC 74-281

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of KAISER BROADCASTING CORP. (ASSIGNOR) AND FAMILY STATIONS, INC. (ASSIGNEE) For Assignment of License of WCAS, Cambridge, Mass.	File No. BAL-7963

ORDER

(Adopted March 14, 1974; Released March 15, 1974)

BY THE COMMISSION:

1. The Commission granted the above captioned application on January 23, 1974. It now has before it a "Motion for Stay Pendente Lite", filed on February 22, 1974 by Committee for Community Access and an Opposition. The Petitioner also filed on February 22, 1974 a Petition for Reconsideration of the assignment of license.

2. IT IS ORDERED that the Motion for Stay Pendente Lite filed on February 22, 1974 by Committee for Community Access IS HEREBY GRANTED to the extent that the effective date of the grant of the above-captioned application is stayed pending a decision on the Petition for Reconsideration.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-223

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of KANAWHA CABLE TELEVISION CO., CROSS LANES, W. VA. For Certificate of Compliance	CAC-2946 WV383

MEMORANDUM OPINION AND ORDER

(Adopted March 6, 1974; Released March 7, 1974)

BY THE COMMISSION:

1. Kanawha Cable Television Company has filed the above-captioned application for a certificate of compliance to begin cable television service at Cross Lanes, West Virginia (approximate population 3,000), an unincorporated community in the major television market of Charleston-Huntington, West Virginia (#36). Kanawha proposes to carry the following television broadcast signals on its 24-channel system:

WCHS-TV (CBS, Channel 8) Charleston, West Virginia.
WHTN-TV (ABC, Channel 13) Huntington, West Virginia.
WSAZ-TV (NBC, Channel 3), Huntington, West Virginia.
WMUL-TV (Educ., Channel 33) Huntington, West Virginia.
WSWP-TV (Educ., Channel 9) Grandview, West Virginia.

Carriage of all of these signals is consistent with Section 76.61 of the Commission's Rules, and the application is unopposed.

2. The Cross Lanes system is an extension of existing systems at St. Albans and Nitro, West Virginia, and will ultimately have less than 800 subscribers. Kanawha requests a temporary waiver of Section 76.251 of the Commission's Rules until March 31, 1977, at which time the main system at St. Albans will be commencing access cablecasting services. We note that the St. Albans system has been in operation since 1966 and has a 12-channel capacity. Kanawha further seeks a waiver of the franchise-holding requirement of Section 76.31. In support of this request, Kanawha has submitted a letter from the Kanawha County Attorney, Larry W. Andrews, which states that the County Court lacks the statutory authority to issue a franchise. Kanawha has stated that it will construct the system within 12 months of certification, charge an initial monthly rate of $5.15, maintain a local business office for the assistance of its subscribers, and observe all pertinent federal, state, and local laws, and all amendments thereto.

3. We believe that Kanawha has submitted an "acceptable alternative proposal" to a formal franchise.[1] As we have stated elsewhere, it is not desirable to inhibit the development of cable television in areas where the local government is either unable or unwilling to undertake their portion of the regulatory framework.[2] Following established precedent, any certificate granted herein will be made effective to March 31, 1977, and will be subject to any further orders of the Commission designed to resolve general problems inherent in nonfranchised cable operations or to address any special problems that may be brought to the Commission's attention involving cable operation in the subject community.

4. We are persuaded by Kanawha Cable's access waiver request. Kanawha Cable has indicated that the maximum potential number of subscribers, after one year of operation, in Cross Lanes is anticipated to be 400–450. It further indicates that the cost of providing required access services at this time would be prohibitive because of system design: since Cross Lanes is an extension of the St. Albans and Nitro systems and is served from the same headend, immediate compliance with Section 76.251 would necessitate the complete rebuilding of the existing systems. In view of the small number of potential subscribers, the costs involved, and the fact that in only three years Section 76.251 calls for the provision of access services on all three systems, we find a waiver of Section 76.251 of the Rules until March 31, 1977, to be justified and in the public interest.

In view of the foregoing, the Commission finds that a grant of the above-captioned application and temporary waiver of Section 76.251 would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the above-captioned application for certificate of compliance IS GRANTED, and the appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[1] *Coastal Cable, Inc.*, FCC 73–631, 41 FCC 2d 857 (1973); *Armstrong Utilities, Inc.*, FCC 73–242, 40 FCC 2d 837 (1973); *Mahoning Valley Cablevision, Inc.*, FCC 73–243, 39 FCC 2d 939 (1973); *Lake Telephone Co.*, FCC 73–1243, 44 FCC 2d 45 (1973); *Western Wildflower Corp.*, FCC 73–1345, —— FCC 2d —— (1973). See also Para. 116, *Reconsideration of the Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 366 (1972).

[2] *Armstrong Utilities, Inc., supra.*

FCC 74-239

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF KJET, INC., RADIO STATION KWIC(FM), BEAUMONT, TEX.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted March 7, 1974; Released March 13, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated February 21, 1973 issued to KJET, Inc.,[1] licensee of Radio Station KJET-FM, Beaumont, Texas, and (2) the licensee's response thereto dated March 16, 1973.[2]

2. The Notice of Apparent Liability for forfeiture in the amount of one thousand dollars ($1,000) was issued in this proceeding for willful or repeated violation of Section 73.265(b)[3] of the Commission's Rules for operating the station with improperly licensed operators in charge of the transmitter as follows, indicating the operator's name, type of license or permit held, and the time that the operator was in charge of the transmitter:

Alice Marie Andrews (Robinson) RP#26B8720 (Restricted Permit) issued March 4, 1963.

March 1, 1972, 8:30 a.m. to 12:15 p.m.
March 2, 1972, 8:30 a.m. to presumably 12:00 Noon (no sign off in log).
March 3, 1972, 8:30 a.m. to 12:00 Noon.
March 6, 1972, 8:30 a.m. to Presumably 12:00 Noon (no sign off in log).
March 7, 1972, 8:30 a.m. to 11:30 a.m.
March 8, 1972, 8:30 a.m. to 12:00 Noon.
March 9, 1972, 8:30 a.m. to 11:30 a.m.
March 10, 1972, 8:30 a.m. to 12:00 Noon.
March 10, 1972, 1:00 p.m. to 4:00 p.m.
March 13, 1972, 8:30 a.m. to 4:00 p.m.

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[1] By modification of license (BMLH-471) granted October 23, 1973, the name of the licensee was changed from KJET, Inc., to Gibson Broadcasting Company.

[2] The call letters of Station KJET-FM were changed to KWIC(FM) effective March 5, 1973.

[3] Section 73.265 has been amended and the various paragraphs renumbered. However, before and after amendment, the section has required that the operator in charge at the transmitter must be at least a third-class radiotelephone operator with license endorsed for broadcast station operation.

George V. Sumaya—P3–9B–3302 (no Broadcast Endorsement) issued February 29, 1972.

March 25, 1972, 11:00 a.m. to 4:00 p.m.
March 26, 1972, 11:00 a.m. to 4:00 p.m.
April 1, 1972, 11:00 a.m. to 4:00 p.m.
April 2, 1972, 9:30 a.m. to 4:00 p.m.
April 8, 1972, 11:00 a.m. to 4:00 p.m.
April 9, 1972, 11:00 a.m. to 4:00 p.m.
April 15, 1972, 11:00 a.m. to 4:00 p.m.
April 16, 1972, 11:00 a.m. to 4:00 p.m.
April 22, 1972, 11:00 a.m. to 4:00 p.m.
April 23, 1972, 11:00 a.m. to 4:00 p.m.

Lee H. Simpson—P3–9–12842 (no Broadcast Endorsement) issued November 3, 1971; Also PC3–9–631 issued April 3, 1972.

March 2, 1972, 12:00 Midnight to 6:00 a.m.
March 3, 1972, 12:00 Midnight to 6:00 a.m.
March 7, 1972, 3:30 a.m. to 6:00 a.m.
March 8, 1972, 12:00 Midnight to 6:00 a.m.
March 9, 1972, 12:00 Midnight to 6:00 a.m.
March 10, 1972, 12:00 Midnight to 6:00 a.m.
March 11, 1972, 12:00 Midnight to 6:00 a.m.
March 14, 1972, 12:00 Midnight to 6:00 a.m.
March 15, 1972, 12:00 Midnight to 6:00 a.m.
March 16, 1972, 12:00 Midnight to 6:00 a.m.

The Notice of Apparent Liability was also issued for willful or repeated violation of Section 73.283(a) of the Commission's Rules, in that there were omissions of all entries in the operating logs on dates and times as follows:

March 4, 1972, 8:30 a.m. to 12:00 Noon.
March 22, 1972, 6:00 a.m. to 8:00 a.m.
March 24, 1972, 8:00 a.m. to 11:00 a.m.
April 11, 1972, 4:30 p.m. to 6:30 p.m.
April 23, 1972, 4:00 p.m. to 6:00 p.m.
April 30, 1972, 4:00 p.m. to 6:00 p.m.
May 7, 1972, 12:01 a.m. to 6:00 a.m.
May 7, 1972, 6:00 p.m. to 12:00 Midnight.
May 12, 1972, 12:00 Noon to 12:00 Midnight.
May 14, 1972, 6:00 a.m. to 6:00 p.m.

3. In response to the Notice of Apparent Liability licensee states that the violations were not willful and/or intentional and adopts by reference statements it made in response to the Official Notice of Violation which statements were quoted in the Notice of Apparent Liability. The text of licensee's response as quoted in the Notice of Apparent Liability is attached hereto as Appendix A. In addition the licensee states:

> In a continuing attempt to provide full time employment for minority group members KJET–FM has made it a practice to hire and in some instances train Black individuals for full-time employment. In many instances these individuals are not as well qualified nor are they familiar with FCC Rules and policies as others. However, KJET in an effort to implement its Equal Employment Opportunity Program has nevertheless gone forward to offer full-time positions to

these individuals lacking experience and expertise but showing promise. Thus, KJET has served as a laboratory for such members of the community who would otherwise go unemployed in the field they have chosen to make a career. This is not being offered as an excuse for the violations nor is KJET, Inc. requesting the Commission to pass over such violations lightly. What we are asking is for the Commission to show some compassion and understanding over the plight of KJET, Inc. by removing the forfeiture or substituting a more nominal fine for the previously levied $1,000 penalty.

Steps have and are continually being taken to guard against the confusion and errors of omission and commission which took place at the time of the inspection. This was fully and clearly outlined in earlier correspondence to the Commission. Yet, if KJET is to continue to fully implement its Equal Employment Opportunity Program some leeway must be permitted by the Commission—no one is perfect. KJET, Inc. is not asking for preferred treatment but rather understanding from the Commission if it is to continue its employment practices in the public interest.

In short, KJET relied heavily upon the representations made by its employee-applicants and the Broadcast Schools which supported their employment. It seems unfair for the Commission to punish KJET for the misrepresentations made by those employees and their training schools when the Commission has imposed an affirmative obligation upon licensees such as KJET to specifically go forward to seek minority employees using those schools and/or agencies having significant minority enrollment as the prime source for such talent.

In view of the above, the Commission is urged to rescind the forfeiture or, in the alternative, to impose a nominal $100 fine in lieu thereof.

4. We commend the licensee's efforts to hire and train minority employees, but such efforts by a licensee to comply with Commission Rules and policies concerning equal employment opportunities do not nullify Commission Rules pertaining to qualifications of operators and the keeping of an operating log. The licensee failed to inspect the permits of Alice Andrews (who had no operator's permit) and Lee Simpson (who had made application for a Provisional Operator Permit but had not received the permit) and failed to exercise the requisite supervision over George Samava to determine that he followed instructions not to operate the transmitter. Also, a review of the operating logs would have disclosed the failure to make entries on the dates and at the times listed. We find that the licensee repeatedly violated Section 73.265(b) and Section 73.283(a) of the Commission's Rules by operating the station with improperly licensed operators in charge of the transmitter and by the omission of entries in the operating logs, as herein above set forth. Having found the violations to be repeated, we find it unnecessary to make any additional determination as to whether the violations were willful. *Paul A. Stewart*, 45 FCC 773 (1963). A licensee is responsible for making sure that the station is operated only by properly licensed persons and should obtain documentary proof regarding the operator's license prior to employment. *Pacific Western Broadcasters, Inc.*, 8 FCC 2d 534 (1967). Further, licensees are expected to comply with all of the Commission's Rules. *J. C. Johnson, tr/as Lowndes County Broadcasting Co.*, 23 FCC 2d 91 (1970). We have considered the circumstances of this case and the licensee's response to the Notice of Apparent Liability, including the matters referred to therein, and we are not persuaded to remit the forfeiture or reduce the amount thereof.

5. In view of the foregoing, IT IS ORDERED, That KJET, Inc former licensee of Radio Station KWIC(FM), Beaumont, Texas,

FORFEIT to the United States the sum of one thousand dollars ($1,000) for repeated violation of Section 73.265(b) and 73.283(a) of the Commission's Rules. Payment of this forfeiture may be made by mailing a check, or other similar instrument, to the Commission payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX A

In reply to the Notice of Violation you state:

"RESPONSE *Alice Marie Andrews* This operator worked for KJET prior to the time broadcast endorsements were required and, as a matter of fact, at such time was not required to take meter readings and fill out transmitter logs, although she held a restricted permit which all parties believed was equivalent to a third class radiotelephone license and therefore gave her authority for such operation of KJET. When Alice Andrews was recently re-hired at KJET, she assured management and engineering that she was properly licensed but had temporarily misplaced the license. Having found Alice Andrews to be a person of good reputation in the past there was no reason to doubt her word.

"Upon presenting her license for posting it was discovered that she held a restricted permit and she was immediately removed from any and all duties having to do with transmitter operation. Moreover, management has been working with Alice Andrews to prepare her for the third class radiotelephone license with the broadcast endorsement. Moreover, I have been assured by the Chief Engineer for KJET that Alice Andrews has demonstrated the ability to correctly read meters and keep transmitter logs and it was his belief that she was properly licensed to do so. He is now working closely with her in a further attempt to provide the necessary instructional background for the examination.

"B. *George Samaya* When George Samaya was hired by KJET he was under express instructions not to keep transmitter logs but that such logs would be properly maintained by another employee. When it was discovered that Mr. Samaya was taking transmitter readings and keeping transmitter logs he was again admonished by management not to do so until he qualified at the Federal Communications Commission with a Broadcast Endorsement. Mr. Samaya was instructed as to the steps and procedures to obtain such a license and management volunteered its assistance to prepare Mr. Samaya for this advanced step. Unfortunately, his first attempt at passing the test in Beaumont, Texas for a Provisional Certificate was unsuccessful. However, he will continue to work towards obtaining an advanced Certificate. This will advise that in no case will he be permitted to keep transmitter logs until he is properly licensed, and a Certificate posted at the operating point. Any deviation from this procedure will result in the immediate dismissal of Mr. Samaya.

"C. *Lee Simpson* This operator had completed the FCC Form and application necessary for a Provisional Certificate prior to employment for KJET, and therefore believed as did the Chief Engineer at KJET, that he was properly licensed as of the date the application was signed by the Chief Engineer at KJET. While the Provisional Certificate actually was dated after he began to work at KJET through innocent mistake was believed that the execution date was the date to be guided by. Adding to the confusion and misunderstanding concerning Mr. Simpson was the written assurance from the Broadcast School in Houston, Texas which placed Mr. Simpson at KJET that he was, in fact, licensed. Obviously, KJET relied heavily upon this assurance from the Broadcast School.

"This will advise that Simpson was censured by KJET management and engineering for not promptly posting his license when he arrived on the scene. He went forward to post the license and no furthe. thought was given to the matter

104-030—74——5

until the validation date on the Provisional Certificate was dated subsequent to his employment at KJET. In order to avoid against any further misunderstandings, all employees must have their license qualification checked and confirmed by the station manager, the program director and the chief engineer prior to beginning work at KJET."

In your reply to the Notice of this violation you state:

"The referenced inadvertent omissions resulted from confusion on the part of board operators. In the past, separate operators were responsible for the AM and FM boards. However, during the period in question an effort was made to consolidate the meter readings for the operating logs and each operator during the periods in question assumed that the other was fulfilling the station's responsibility for making the proper readings. In order to avoid this in the future a staff meeting was held and all board personnel once again instructed on the procedures to be followed in making the meter readings. No longer will one operator assume that the other is taking the necessary meter readings as a result of the new procedure. Thus, there will *not* be any such omissions in the future."

FCC 74-217

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notification to
LAWRENCE COUNTY BROADCASTING CORP.
Concerning Renewal of License for Station WVKY, Louisa, Ky.

FEBRUARY 27, 1974.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

LAWRENCE COUNTY BROADCASTING CORP.,
Radio Station WVKY,
Louisa, Ky.

GENTLEMEN: The Commission has under consideration (1) your application (BR-4837) for renewal of license for Station WVKY, Louisa, Kentucky; and (2) the results of a field investigation conducted into the operations of WVKY.

Evidence was adduced in the investigation which indicates that beginning January 8, and ending March 30, 1973, WVKY broadcast a contest known as "Jackpot Bowling." Contestants registered for "Jackpot Bowling" by completing an entry blank and placing it in a box at any sponsoring merchant's store. The entry blanks were collected by WVKY and placed in a box at the studio. Five times daily a WVKY announcer selected a contestant by drawing a name from the box. The contestant was then called on the telephone and asked to select the name of one of WVKY's announcers who would "bowl" for him. WVKY had previously recorded on five separate tape-cartridges, each containing sound effects portraying one of the five announcers as bowling either a "strike," "pins left standing," or a "gutter ball." The three results were sequentially recorded on the tape in endless-loop fashion so that one result always followed another. After the contestant selected an announcer to bowl, the cartridge for that announcer was inserted in the tape playback equipment. The contestant then guessed whether the announcer would roll a strike, leave pins standing or bowl a gutter ball. The cartridge was then played on the air. If the contestant's guess matched the segment played, he won the cash in the jackpot; if the guess was incorrect, the contestant lost. In that event, his entry card was returned to the box for another chance.

Four separate versions of the "Jackpot Bowling" contest were broadcast between the contest's inception and its conclusion. The first version was conducted as described above; however, after the licensee expended its entire weekly prize budget in less than two days, a second version was created. In the second version, only three cartridges were employed.

until the validation date on the Provisional Certificate was dated subsequent to his employment at KJET. In order to avoid against any further misunderstandings, all employees must have their license qualification checked and confirmed by the station manager, the program director and the chief engineer prior to beginning work at KJET."

In your reply to the Notice of this violation you state:

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Four separate versions of the "Jackpot Bowling" contest were broadcast between the contest's inception and its conclusion. The first version was conducted as described above; however, after the licensee expended its entire weekly prize budget in less than two days, a second version was created. In the second version, only three cartridges were employed.

These portrayed, respectively, a strike, pins left standing, and a gutter ball. When the contestant was called, he was asked to guess which of the three alternatives set forth above would be bowled. The evidence indicates that the announcer, after eliciting the contestant's guess, would routinely choose one of the other two cartridges, resulting in an automatic loss, without informing listeners or the contestant that the outcome of the contest was predetermined. On occasion, however, a contestant was permitted to win. The general manager of WVKY, Marshall Sidebottom, has admitted that he instructed the announcers to predetermine the result of the contest in order to control the number of winners. The evidence is unclear as to how long this version of the contest was conducted. Estimates of witnesses, however, have ranged from four days to as long as six weeks. There were two other versions of the contest, but they appear to have been conducted properly, and will not be discussed herein.

Section 509(a)(3) of the Communications Act of 1934, as amended, prohibits any person "with intent to deceive the listening or viewing public" from engaging "in any artifice or scheme for the purpose of prearranging or predetermining in whole or in part the outcome of a purportedly bona fide contest of . . . chance." Section 509(a)(4) of the Act prohibits the broadcasting of any radio program, knowing or having reasonable ground for believing that the outcome of a purportedly bona fide contest of chance has been prearranged or predetermined with intent to deceive the listening public.

From the evidence it appears that by predetermining the outcome of the second version of the "Jackpot Bowling" contest, while concealing such predetermining from the listening public, the licensee violated the terms of Section 509 of the Act. As set forth in Section 509(c) of the Act, violators may be fined up to $10,000 or imprisoned up to a year, or both. The broadcast of "rigged" contests such as you broadcast constitutes a serious breach of the public interest you are licensed to serve. We have consistently required licensees to supervise carefully the contests which they broadcast. In *KOLOB Broadcasting Company, Inc.* (*KCCC*), 36 FCC 2d 586, 587 (1972), the Commission said that it:

> . . . requires that licensees that conduct contests adequately supervise and control the contests to assure that they are conducted fairly and are substantially as represented in announcements to the public.

It appears that you have substantially fallen short of the degree of responsibility expected of a licensee with regard to the broadcast of contests. Accordingly we are unable to make an affirmative finding that the public interest, convenience, and necessity would be served by the renewal of your license for the normal term. Instead, and in order that we may have an earlier opportunity to review the operation of Radio Station WVKY, we are granting short term renewal of license for the period ending April 1, 1975.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

FCC 74R-97

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
JERRY LAWRENCE, SANTA PAULA, CALIF.	Docket No. 19865 File No. BPH-8051
WILLIAM F. WALLACE AND ANNE K. WALLACE, JOINT TENANTS, SANTA PAULA, CALIF.	Docket No. 19866 File No. BPH-8105
CLARK ORTONE, INC., FILLMORE, CALIF.	Docket No. 19867 File No. BPH-8111
CLASS A BROADCASTERS, INC., FILLMORE, CALIF. For Construction Permits	Docket No. 19868 File No. BPH-8234

ORDER

(Adopted March 14, 1974; Released March 15, 1974)

BY THE REVIEW BOARD:

1. The Review Board having under consideration the petition filed on March 13, 1974, by Class A Broadcasters, Inc., for an extension of time to and including April 15, 1974, within which to file responsive pleadings to the petition to enlarge issues, filed on March 1, 1974, by William F. Wallace and Anne K. Wallace, Joint Tenants;

2. IT APPEARING, That counsel for the other parties have indicated to petitioner their consent to a grant of the relief requested;

3. IT IS ORDERED, That the petition for extension of time IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-224

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of LOOK TELEVISION CORP. (WJJY-TV), JACKSONVILLE, ILL. For Renewal of License	Docket No. 19340 File No. BRCT-663

ORDER

(Adopted March 7, 1974; Released March 13, 1974)

BY THE COMMISSION:

1. The Commission has before it: (a) our Order released December 20, 1973 (44 FCC 2d 316), renewing the license of Station WJJY-TV, subject to the condition that an application for assignment of the license to a qualified buyer be filed within 60 days and authorizing the station to continue to remain silent; (b) a petition for extension of time, filed February 19, 1974 by the licensee, requesting that the time for filing an assignment application and the authority to remain silent be extended for forty-five days; and (c) a letter filed February 19, 1974 on behalf of a local Jacksonville group which is negotiating for purchase of the station assets, requesting that the time for filing an assignment application be extended for a reasonable period.

2. It appears that good cause exists for extending the filing date and the authority to remain silent in order to afford the parties an opportunity to complete their negotiations.

3. Accordingly, IT IS ORDERED, That, the time for filing an assignment application is hereby extended to April 22, 1974.

4. IT IS FURTHER ORDERED, That, the licensee IS HEREBY AUTHORIZED to continue to permit Station WJJY-TV to remain silent until an assignment of the license, provided an assignment application is filed by April 22, 1974, is granted by the Commission.

5. AND, IT IS FURTHER ORDERED, That, no further extensions of time in which to file an assignment application or further authorizations to remain silent will be granted.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-228

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENTS OF PARTS 2 AND 83, STATIONS ON SHIPBOARD IN THE MARITIME SERVICES, TO PERMIT THE USE OF THE FREQUENCIES 121.5 MHz AND 243 MHz BY SHIP STATIONS, SURVIVAL CRAFT STATIONS, AND EMERGENCY POSITION INDICATING RADIOBEACONS.	Docket No. 19693

REPORT AND ORDER

(Adopted March 7, 1974; Released March 14, 1974)

BY THE COMMISSION:

1. The Commission has been working toward the improvement of the methods of locating both downed aircraft and vessels of seafarers in distress for several years. In a previous Docket (19647), the use of emergency locator transmitters (ELTs) for aircraft was provided for. In this instant Docket (19693), the use by the marine community of a comparable item, the emergency position indicating radiobeacon (EPIRB), is provided. A Notice of Proposed Rule Making in this matter was adopted February 21, 1973, released February 26, 1973 and published in the Federal Register March 5, 1973 (38 F.R. 5970). The time for filing of comments and reply comments has passed.

2. In the Aviation Radio Services both 121.5 and 243 MHz are available for communications related to emergencies and to search and rescue operations. Presently only the frequency 121.5 MHz is available in the maritime service, and then, only under certain limited conditions for radiobeacon purposes. Since both air and surface craft are generally involved in emergencies and search and rescue operations in offshore water areas, it appears that it would be in the best interests of safety of life at sea if there were fewer restrictions on the use of these frequencies in the maritime service.

3. The frequency 121.5 MHz is a universally used radiotelephone channel (class A3 emission) for aircraft in distress or condition of emergency. It also provides aviation a common frequency for survival communications and for emergency locator beacons (emission A9). Locator beacons of this type are commonly referred to as Emergency Locator Transmitters (ELTs) or Emergency Position Indicating Radiobeacons (EPIRBs). In the maritime community the most universally used term is the latter, so that designation will be used herein and in the rules. The use of 121.5 MHz by maritime interests in the U.S. is presently limited to vessels which have been registered or docu-

mented by the U.S. Coast Guard. For the most part these are commercial vessels of over 5 gross tons. Its use is further limited to class A2 emission, and to vessels which are authorized to carry and are equipped with a ship station.

4. The frequency 243 MHz, normally used by U.S. military aircraft for survival purposes, is available nationally for use by survival craft stations and equipment used for survival purposes (footnote US98). However, no provisions have been made in Part 83 to implement this footnote for the maritime service. Amendment of the rules, as set forth in the attached Appendix, provides for the use of both the frequencies 121.5 and 243 MHz by all U.S. vessels expected to operate in international waters beyond the range of marine VHF distress coverage for use in survival craft and emergency position indicating radiobeacon (EPIRB) stations. Marine use of these frequencies in EPIRBs will be permitted in the same manner as they are used by civil aircraft in ELTs, with substantially the same technical characteristics and packaging requirements as observed by aviation. This will increase the efficiency of search and rescue operations as well as provide greater safety for an increased number of vessels and will permit some degree of standardization of survival radiobeacons. In addition, the amendment provides for the use of radiotelephony (class A3 emission) on the frequency 121.5 MHz by authorized ship stations for emergency communications between ships and aircraft. The frequency 123.1 MHz is the auxiliary scene of action frequency used in conjunction with 121.5 MHz by those involved in the rescue operation. This is also provided for.

5. It is recognized that the EPIRB, as well as the aviation ELT, will often serve as a distress alerting device when other methods of communication are not successful or available. However, the marine use of 121.5/243 MHz for EPIRBs is generally limited to the oceanic areas approximately 20 miles or more offshore, as described by the phrase "those whose vessels are expected to operate in international waters beyond the range of marine VHF distress coverage." It is felt that the safety of this rather limited number of vessels can be improved substantially and immediately by the use of EPIRBs, and that their use of the frequencies can be effectively controlled. The millions of recreational boats which operate near the shore and in inland waters have been purposely excluded, since these vessels may use marine VHF radio or other extremely reliable methods to alert the shore to their situation. Also the potential inadvertent or improper use by this very large population could render the existing aviation distress and safety system, as well as the offshore marine use, completely ineffective.

6. The amendment to the rules conforms basically with the recommendations adopted by the Maritime World Administrative Radio Conference, Geneva, 1967, and with Recommendation 48 of the 1960 Safety of Life at Sea Conference and subsequent recommendations of the Subcommittee on Radio-communications and the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (IMCO). More specifically the amendment is in response to a recent request of the U.S. Coast Guard and to recent recommendations of the National Transportation Safety Board.

7. All commentators were agreed on the need for the provision, in the rules, for marine use of beacons using the frequencies 121.5 and 243 MHz for emergency locating purposes. There were differences of opinion in the means and frequency of required testing, the technical specifications and the type of vessels permitted to use the beacons.

8. Six comments were received and no reply comments were received. The received comments were diversified as they were presented by: Pacific Far East Line, Inc. (PFEL), a public carrier steamship line; American Radio Association, AFL–CIO and Radio Officers' Union, AFL–CIO (AFL–CIO) jointly; Aeronautical Radio, Inc. (ARINC), a non-profit organization which is owned and operated by airlines and which supplies aeronautical communications services; American Institute of Merchant Shipping (AIMS) representing many U.S. Flag deep sea shipping companies; and two equipment manufacturers, Dayton Aircraft Products, Inc. (DAP) and Burndept Electronics, LTD. (Burndept).

9. Several specific comments were directed not at the Commission's Notice of Proposed Rule Making, but at the Coast Guard's proposal which was simultaneously printed in the Federal Register. Those portions of the comments addressed to the Coast Guard regulation are discussed here only as they apply to the Commission's authority.

10. PFEL expressed opposition to the FCC's proposal that EPIRBs for use in the maritime service be different in any respect from similar requirements governing the aircraft ELTs. We do not accept their position. Conditions at sea will often submit EPIRBs to weather and humidity environment requiring technical specifications not necessarily imposed on ELTs. PFEL is opposed to the USCG testing equipment rather than the FCC. Without regard to the requirements of the USCG, it is, of course, the routine inspection of radio equipment by FCC representatives which will be maintained in regard to EPIRBs as with other such equipment. If the Coast Guard also requires additional inspections and tests as a part of their requirement for mandatory carriage of this item, then that is beyond the scope of this docket as is also PFEL's opposition to the USCG's requirement for float off storage.

11. The AFL–CIO proposed weekly tests at sea and within 24 hours of departure by a qualified licensee and logging of the tests. It is not the intention of the Commission to require any testing of the EPIRBs other than that conducted as a normal part of the Field Operations Bureau's routine inspection of marine radio equipment. In any event, the equipment as specified in Section 83.144(d) will be capable of being tested by untrained personnel, either during the first five minutes of any hour, with the cooperation of the Coast Guard or, if equipped with manually operated test switch, at any time merely by observing an indicator or listening to the swept tone. We recognize the advantage of having the confidence factor of a visual or aural indication of the EPIRBs capability to function. We are opposed to frequent testing of the beacons for technical reasons as well as because of the potential problem of inadvertent activation of the beacon as a result of handling it for testing. We, therefore, discourage the testing of the beacon except

during the controlled conditions of FCC inspection or during similar infrequent periods.

12. ARINC urged the inclusion of restrictions to the use of 121.5 MHz comparable to the restrictions applicable to aeronautical users. They feel that the amendment as proposed would not assure that 121.5 MHz would be limited to bona fide emergency purposes when utilizing class A3 emission. We find their argument persuasive and have revised the appropriate section accordingly. ARINC objected to testing of EPIRB without proper supervision. We consider the testing into a dummy load, during a specified period of the hour or under Coast Guard supervision as being realistic and practicable and therefore have made no change from the proposal.

13. AIMS asks that the EPIRBs be identical to the approved standard ELTs (DOT standard TSOC 61A). We feel that the conditions at sea impose environmental problems, particularly humidity, which warrant slight variations between the ELTs and EPIRBs. Such conditions have been considered in the amendments. AIMS also states their belief that there is no requirement for shipboard reception of emergency beacon signals. We do not impose such a requirement in our rules. They suggest that EPIRBs be specified as intrinsically safe. We believe that the technical requirements as specified will assure that the equipment will be intrinsically safe. AIMS believes there is a need for both a manual activation capability (on/off) and a manual test capability. Although we have provided for manual test capability, we are fearful of excessive testing, as previously stated, and do not feel that mandatory manual test capability is advisable; except in the case of Class A EPIRBs. (See para. 15 below). We have provided for a positive manual means of deactivation.

14. The equipment manufacturers' comments were either items covered in the text above, directed to the Coast Guard, or were basically presented as information. One specific item which both DAP and Burndept addressed, and which was not mentioned by others, was the specified radiation during test. We agree that the proposed radiation in the test position would introduce unnecessary expense in unit production costs. We have, therefore, revised the radiation level from the previously proposed 15 microvolts per meter at a distance of twenty feet free space to approximately that which Burndept states was found to be suitable after experience, 25 microvolts per meter at 150 feet.

15. The U.S. Coast Guard has notified the Commission of intention to make the carriage of a certain configuration of EPIRBs mandatory on a limited number of vessels. The specified configuration has physical and technical characteristics beyond those previously detailed in the Notice of Proposed Rule Making. For purposes of inclusion of those EPIRBs in the rules, a new subsection has been added. In order to distinguish those specific EPIRBs from the other configurations, we have identified them as Class A items of equipment.

16. In view of the foregoing, IT IS ORDERED, That pursuant to the authority contained in Sections 4(i), 303(r) and 318 to the Communications Act of 1934, as amended, Parts 2 and 83 of the Commission's rules, ARE AMENDED, effective April 19, 1974, as set forth in

the attached Appendix. IT IS FURTHER ORDERED, That this proceeding is hereby TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Parts 2 and 83 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

1. In § 2.106, column 11 is amended as follows:

"§ 2.106 TABLE OF FREQUENCY ALLOCATIONS.

"Frequency MHz	Nature {Of services of stations
10	11
* * *	* * * *
121.5	AERONAUTICAL MOBILE. Maritime search and rescue. Survival craft and equipment.
* * *	* * * *
123.100	Aeronautical search and rescue mobile. Maritime search and rescue mobile. Survival craft and equipment.
* * *	* * * *

2. Section 83.3 is amended by adding a new paragraph (q) to read as follows:

"§ 83.3 MARITIME MOBILE SERVICES.

* * * * * * *

"(q) *Emergency position indicating radiobeacon station.* A station in the maritime mobile service consisting of a transmitter only, the distinctive emissions of which are intended to facilitate search and rescue operations."

3. Section 83.7 is amended by adding a new paragraph (1) to read as follows:

"§ 83.7 TECHNICAL.

* * * * * * *

"(1) *Peak effective radiated power.* For emergency position indicating radiobeacon stations, the average power supplied to the antenna by the transmitter during one radio frequency cycle at the highest crest of the modulation envelope, multiplied by the relative gain of the antenna in a given direction. The relative gain is referenced to a quarterwave loss free monopole mounted on a one wavelength diameter ground plane."

4. Section 83.68 and headnote are revised to read as follows:

"§ 83.68 AUTHORITY FOR SURVIVAL CRAFT STATIONS AND EMERGENCY POSITION INDICATING RADIOBEACON STATIONS.

"(a) Authority to operate survival craft stations, which may include an emergency position indicating radiobeacon (EPIRB) station, will be granted only when the parent vessel is equipped with and authorized to operate a ship station.

"(b) Authority to operate an EPIRB station will be granted only for use aboard vessels authorized to carry survival craft stations or to those whose vessels are expected to operate in international waters beyond the range of marine VHF distress coverage."

5. In § 83.131, the introductory text of paragraph (c) is amended and subparagraph (3) is added to read as follows:

"§ 83.131 AUTHORIZED FREQUENCY TOLERANCE.

* * * * * * *

"(c) Authorized frequency tolerance for ship, survival craft and emergency position indicating radiobeacon (EPIRB) stations operating on frequencies above 27.5 MHz.

* * * * * * *

"(3) EPIRB stations on 121.5 and 243 MHz..... 50

* * * * * * *

6. In § 83.132(a), subdivisions (iii) and (iv) are added to subparagraph (1) and subdivision (ii) of subparagraph (2) is amended to read as follows:

"§ 83.132 AUTHORIZED CLASSES OF EMISSION.

"(a) * * *

"(1) * * *

"(iii) For the frequency 121.5 MHz..... A2, A9

"(iv) For the frequency 243 MHz..... A9

"(2) * * *

"(ii) For the frequencies 121.5 and 123.1 MHz..... A3

* * * * * * *

7. In § 83.133(a), the table is amended to add emission A9 and footnote [5] to read as follows:

"§ 83.133 AUTHORIZED BANDWIDTH.

* * * * * * *

"Class of emission	Emission designator	Authorized bandwidth (kHz)
* * *	* * *	*
A3	6A3	8.0
A9	3.2A9	[5] 25.0
F1	0.3F1 [1]	[1] .5
* * *	* * *	*

* * * * * * *

[5] Applicable only to emergency position indicating radiobeacon stations.

* * * * * * *

8. Section 83.134 is amended by adding a new paragraph (i) to read as follows:

"§ 83.134 TRANSMITTER POWER.

* * * * * * *

"(i) For emergency position indicating radiobeacon stations operating on the frequencies 121.5 and 243 MHz the peak effective radiated power on each frequency, measured during and at the end of 48 hours of continuous operation, and without replacement or recharge of batteries, shall not be less than 75 milliwatts. This specification shall apply to all units whether dry, or immersed for any or all of the forty-eight hour period in fresh or salt-water, as long as the entire antenna extends above the water surface. The method of peak effective radiated power measurement specified in the Radio Technical Commission for Aeronautics (RTCA) Document Numbers DO–145 or DO–146 shall be employed. The required power shall obtain over an air temperature range from −20 to +55 degrees centigrade."

9. Section 83.137 is amended by adding a new paragraph (i) to read as follows:

"§ 83.137 MODULATION REQUIREMENTS.

* * * * * * *

"(i) Emergency position indicating radiobeacon stations operating on the frequencies 121.5 and 243 MHz shall employ a distinctive emission consisting of amplitude modulation of the carrier with an audio frequency sweeping downward over a range of not less than 700 Hz, within the range 1600 to 300 Hz, with a sweep rate between 2 and 4 times per second. The modulation applied to the carrier shall be in accordance with that specified in the Radio Technical Commission for Aeronautics (RTCA) Document Numbers DO–145 or DO–146."

10. Section 83.139(b) is amended to read as follows:

"§ 83.139 Acceptability of Transmitters for Licensing.

* * * * * * *

"(b) Each survival craft station transmitter or emergency position indicating radiobeacon station transmitter which has not been type approved pursuant to § 83.469 or § 83.472 shall be type accepted for licensing.

* * * * * * *

11. Section 83.141(a)(4) & (b) are amended and a new paragraph (d) is added to read as follows:

"§ 83.141 Special Requirements for Survival Craft Stations.

"(a) * * *

"(4) The frequency 121.5 MHz, be able to use A2 or A3 emission and where A3 emission is used the equipment must also be capable of transmitting on 123.1 MHz using A3 emission.

"(b) Receivers used in survival craft stations shall be capable of receiving the frequency and types of emission which the transmitter is capable of using: *Provided*, That where the transmitter frequency is 8364 kHz the receiver shall be capable of receiving A1 and A2 emission throughout the band 8320–8745 kHz.

* * * * * * *

"(d) When an EPIRB station is contained as a part of a survival craft station, the EPIRB portion shall be limited to the frequencies 121.5 and 243 MHz (transmission only) and to A9 emission only."

12. A new Section 83.144 is added to read as follows:

"§ 83.144 Special Requirements for Emergency Position Indicating Radiobeacon Stations.

"(a) Emergency position indicating radiobeacon (EPIRB) stations are limited to transmission only, using A9 emission, on the frequencies 121.5 and 243 MHz.

"(b) The EPIRB may be turned on by automatic means, such as water activated battery, or by an on-off switch. In any event, a positive means of turning the equipment off shall be provided. Where an on-off switch is employed, a guard or other means shall be provided to prevent inadvertent activation.

"(c) The EPIRB shall be provided with a visual and/or audible indicator which clearly shows that the device is transmitting.

"(d) In regard to testing, the following criteria for EPIRBs applies:

"(1) May be fitted with a manually-activated test switch, or comparable device, associated test circuit, and output indicator which shall, in the test position:

"(i) Permit the operator to determine that the unit is operative;

"(ii) Switch the transmitter output to a test circuit (dummy load), the impedance of which is equivalent to that of the antenna affixed to the EPIRB; and

"(iii) Reduce radiation to a level not to exceed 25 microvolts per meter at a distance of one hundred fifty (150) feet, free space, irrespective of direction.

"(2) If so equipped, the manually-activated test switch, or comparable device, shall be of a type which must be held in position to operate, and which will switch the transmitter off and reconnect the output from the test circuit (dummy load) to the antenna when released. A guard or other means shall be provided to prevent its inadvertent activation.

"(3) Means shall be provided to protect the indicator from damage due to dropping or contact with other objects.

"(4) An EPIRB without a test circuit as described above in (1) and (2) may be tested in coordination with, or under the control of the U.S. Coast Guard to insure that testing is conducted under electronic shielding, or other conditions sufficient to insure that no transmission or radiated energy occurs that could

be received by a radio station and result in a false distress alarm. If testing with Coast Guard involvement is not practicable, brief operational tests are authorized provided the tests are conducted within the first five minutes of any hour, are not longer than three audio sweeps or one second, whichever is longer, and, if available, a dummy load is used during test.

"(e) The power and modulation requirements specified in this Part for EPIRBs shall be met under the environmental test conditions, with the exception of the temperature limits, specified in the Radio Technical Commission for Aeronautics (RTCA) Document Numbers DO–145 or DO–146. The air temperature limits for testing these devices shall be from —20 to 55 degrees centigrade. Additionally those tests specified by RTCA with regard to altitude, decompression and overpressure are not applicable to EPIRB stations.

"(f) The equipment shall not incorporate any vacuum tubes in its design. Components shall be so rated that the equipment will meet the requirements specified for EPIRBs in this Part after extended periods of inaction while carried in vessels and subjected to the environmental conditions prescribed. Operation into any load likely to occur in service, from open to short, shall not cause continuing degradation in performance.

"(g) The operation of controls intended for use during normal operation in all possible combinations or sequences shall not result in a condition whose presence or continuation would be detrimental to the continued performance of the equipment. The number of controls shall be kept to a minimum to permit ease of operation of the equipment.

"(h) The EPIRB shall have a battery for power supply which is independent of the vessel power supply. The battery, whether an original or replacement component, shall be designed as an integral part of the equipment or be securely attached thereto. The date (month and year) of the battery's manufacture shall be permanently and legibly marked on the battery and the expiration date (month and year) upon which 50 percent of its useful life has expired shall be permanently and legibly marked on both the battery and the outside of the transmitter. The useful life of the battery (established by the EPIRB manufacturer) is the length of time, after its date of manufacture, that the battery may be stored under normal marine environmental conditions without losing its ability to meet the transmitter power requirement prescribed in section 83.134(h). The electromechanical connectors on and to the battery must be corrosion resistant and positive in action, and may not rely for contact upon spring force alone.

"(i) The EPIRB shall be waterproof and shall not be accidentally activated by rain, seaspray, hose wash-down spray or storage in high humidity conditions. The effects of standing water on the outer surface of the equipment shall have no significant adverse effect upon the performance of the EPIRB.

"(j) Concise, unambiguous operating instructions, understandable by untrained personnel, shall be conspicuously and permanently displayed on the equipment. The display shall be weather resistant, waterproof, and abrasion resistant.

"(k) The exterior of the equipment shall have no sharp edges or projections which could easily damage inflatable survival equipment, injure personnel or damage their clothing. Means shall be provided to secure the EPIRB to a survival craft or person.

"(l) If the antenna is not designed to be stowed in its normal operating position, the antenna shall be deployable to the designed length and operating position in a foolproof manner. The antenna shall be securely attached to the EPIRB and of such design that it is easy to de-ice. The antenna shall provide optimum performance at 121.5 and 243 MHz and its radiation pattern in the horizontal plane shall be essentially omnidirectional.

"(m) The equipment shall be so designed that it may be deployed, its controls actuated, or the antenna erected, each by a single action task which can be performed by either hand."

13. New Section 83.145 is added:

"§ 83.145 Special Requirements for Emergency Position Indicating Radio Beacon Stations, Class A.

"(a) For purposes of regulations for mandatory carriage by certain vessels a Class A EPIRB is one that is capable of floating free of a sinking vessel and activating automatically.

"(b) In addition to the other requirements for EPIRBs elsewhere in this Part a Class A EPIRB must:

"(1) Operate on frequencies 121.5 and 243 MHz and must have a manually activated test switch or comparable device, associated test circuit, and output indicator;

"(2) Activate automatically when it floats free of a sinking vessel;

"(3) Have an antenna that deploys automatically when the EPIRB activates automatically;

"(4) Float in calm water with at least the upper two inches of the EPIRB out of the water and the base of the antenna at least two inches above the water;

"(5) Be ballasted to right itself from a position of 90° from its upright position in one second or less;

"(6) Meet the requirements of paragraphs (1) through (5) above after free fall into water 3 times from a height of 60 feet; and

"(7) Must be marked with the manufacturer's name, with the type number and with the indication Class A.

"(c) For FCC type-acceptance as a Class A equipment the requirements of (b) above must be met as well as the other requirements for EPIRBs prescribed elsewhere in this Part."

14. Section 83.164(b) is amended to read as follows:

"§ 83.164 WAIVERS OF OPERATOR REQUIREMENT.

* * * * * * *

"(b) No radio operator authorization is required for the operation of a survival craft station or an emergency position indicating radiobeacon station while it is being used solely for survival purposes or to facilitate search and rescue operations.

* * * * * * *

15. Section 83.178 is amended by adding a new paragraph (e) to read as follows:

"§ 83.178 UNAUTHORIZED TRANSMISSIONS.

* * * * * * *

"(e) Use telephony on 243 MHz."

16. Section 83.233, table, is amended to add the frequency bands 118–136 MHz and 225–399.9 MHz to read as follows:

"§ 83.233 FREQUENCIES FOR USE IN DISTRESS.

* * * * * * *

"Frequency band	Emission	Carrier frequency
405 to 535 kHz	A2	500 kHz.[1]
1605 to 4000 kHz	A3, A3H	2182 kHz.
118 to 136 MHz	A2, A3, A9	121.5 MHz.
	A3	123.1 MHz.
156 to 162 MHz	F3	156.8 MHz.
225 to 399.9 MHz	A9	243 MHz.

[1] The maximum transmitter power obtainable shall be used."

17. A new Section 83.252 is added to read as follows:

"§ 83.252 EQUIPMENT TO FACILITATE SEARCH AND RESCUE OPERATIONS.

"(a) Survival craft stations may transmit the signals, calls and messages described in this subpart.

"(b) Emergency position indicating radiobeacons may transmit only the distinctive emission specified in § 83.137 and only on the frequencies 121.5 and 243 MHz."

18. Section 83.322(c) is amended and a new paragraph (d) is added to read as follows:

"§ 83.322 FREQUENCIES FOR USE IN DISTRESS.

* * * * * * *

"(c) The frequency 121.5 MHz (using class A2 emission) is available for radiobeacon purposes to survival craft stations. The frequency 121.5 MHz (using A9 emission) is available to emergency position indicating radiobeacon (EPIRB) stations for facilitating search and rescue operations. The frequency 121.5 MHz (class A3 emission) is available to authorized ship stations for emergency communications between ships and aircraft only if operation on the auxiliary frequency 123.1 MHz is also provided for. The frequency 121.5 is available to authorized ship stations for A3 emission for emergency communications between ships and aircraft involved in coordinated search and rescue operations when other VHF channels are not available. As soon as practicable after establishing contact on 121.5 MHz ships and aircraft engaged in the search and rescue operation should shift to the auxiliary frequency 123.1 MHz. The universal auxiliary frequency 123.1 MHz is available to mobile stations engaged in scene of action search and rescue operations as the auxiliary to the emergency clear channel frequency 121.5 MHz.

"(d) The frequency 243 MHz (class A9 emission only) is available to EPIRB stations for facilitating search and rescue operations."

19. Section 83.326 is amended by adding a new paragraph to read as follows:

"§ 83.326 IDENTIFICATION OF STATIONS.

* * * * * * *

"(c) Emergency position indicating radiobeacon stations do not require identification."

20. Section 83.352(b) is amended and a new paragraph (c) is added to read as follows:

"§ 83.352 FREQUENCIES FOR USE IN DISTRESS.

* * * * * * *

"(b) The frequency 121.5 MHz (using class A2 emission) is available for radiobeacon purposes to survival craft stations. The frequency 121.5 MHz (using A9 emission) is available to emergency position indicating radiobeacon (EPIRB) stations for facilitating search and rescue operations. The frequency 121.5 MHz (class A3 emission) is available to authorized ship stations for emergency communications between ships and aircraft only if operation on the auxiliary frequency 123.1 MHz is also provided for. The frequency 121.5 is available to authorized ship stations for A3 emission for emergency communications between ships and aircraft involved in coordinated search and rescue operations when other VHF channels are not available. As soon as practicable after establishing contact on 121.5 MHz ships and aircraft engaged in the search and rescue operation should shift to the auxiliary frequency 123.1 MHz. The universal auxiliary frequency 123.1 MHz is available to mobile stations engaged in scene of action search and rescue operations as the auxiliary to the emergency clear channel frequency 121.5 MHz.

"(c) The frequency 243 MHz (class A9 emission only) is available to EPIRB stations for facilitating search and rescue operations."

21. Section 83.40(c) is amended to read as follows:

"§ 83.401 ASSIGNABLE FREQUENCIES FOR DIRECTION FINDING.

* * * * * * *

"(c) In the event of distress, the following frequencies may be used for radio direction finding for purposes of search and rescue by any authorized ship or survival craft station or by emergency position indicating radiobeacon stations as described in this part.

410 kHz 500 kHz 2182 kHz 8364 kHz 121.5 MHz 243 MHz"

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
JOHN PIERCE LYNCH
Concerning Denial of Access to Station WGBY–TV, Springfield, Mass., Under Section 312(a)

MARCH 13, 1974.

Mr. JOHN PIERCE LYNCH,
Hampden County Registry of Deeds,
Springfield, Mass.

DEAR MR. LYNCH: This is with further reference to your complaint against station WGBY–TV, Springfield, Massachusetts, in which you allege that you "requested 'access' to WGBY–TV one week after . . . [you] became a qualified candidate for nomination to U.S. Senator."

Your initial complaint to the Commission was dated December 6, 1973 and you requested the Commission to "hold a public hearing relative to mandating free Broadcasting time to major political candidates by the Public Broadcasting Service." You based your request on Question and Answer 9, Section VIII, of the Commission's Public Notice of March 21, 1972, "Use of Broadcast and Cablecast Facilities by Candidates for Public Office," 37 Fed. Reg. 5796, 5805, but you identified no station as having been at fault and furnished no information to support a charge of violation of the law. In response to a Commission letter dated December 13, you wrote on December 19 that you wished to file a specific complaint against WGBY–TV. You stated, "My complaint is based on the fact that as a candidate for nomination to the office of United States Senator in the year 1972, I requested and was refused access to this Channel."

By letter dated January 3, 1974 we requested specific information in order that we could consider your complaint further. In your response thereto of January 8, 1974, you stated that in July 1972 you became a legally qualified candidate for U.S. Senator in one of the political parties' primary election; that you made an oral request for access to WGBY–TV; that Mr. John T. Caldwell, the station's general manager, informed you that the station did not have sufficient time available; and that you did not file a complaint earlier because you were not aware of the procedures for filing a complaint.

In view of the more than 16-month delay between the time you indicate grounds for your complaint arose and the time you filed your complaint, and the lack of more specific information regarding your request for time, it would be difficult at this time for the Commission to make a determination as to whether the licensee of WGBY–TV violated the statute. The fact that you were not aware of the procedures

104-030—74——6

for filing complaints cannot be determinative of this matter since the document containing above-mentioned Question and Answer 9 was a matter of public record in July 1972.

It should be explained that the Federal Election Campaign Act of 1971, upon which you base your complaint, does not impose an absolute obligation on a broadcast licensee to grant every request for time made by every legally qualified candidate for Federal elective office. The amendment to Section 312(a) of the Communications Act on this subject states:

> (7) For *willful or repeated* failure to allow reasonable access to or to permit purchase of reasonable amounts of time . . . [Emphasis added]

Moreover, in its Answer to Question 3 of Section VIII of the Public Notice of March 21, 1972, the Commission stated in part:

> Congress clearly did not intend, to take the extreme case, that during the closing days of a campaign stations should be required to accommodate requests for political time to the exclusion of all or most other types of programming or advertising. Important as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political. It was not intended that all or most time be preempted for political broadcasts. The foregoing appears to be the only definite statement that may be made about the new section, since no all-embracing standard can be set. The test of whether a licensee has met the requirement of the new section is one of reasonableness. The Commission will not substitute its judgment for that of the licensee, but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section.

We hope that the above will serve to explain why we believe it would be inappropriate at this late date, and lacking more complete and specific information, for the Commission to comply with your request.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

FCC 74-143

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PARTS 0, 1, AND 13 OF THE COMMISSION'S RULES REGARDING RADIO APPLICATION PROCEDURES

ORDER

(Adopted February 13, 1974; Released February 19, 1974)

BY THE COMMISSION:

1. The Commission has before it proposals to delete Section 0.311 (a)(13), amend Sections 1.83(a) (1) and (2), 13.4(c), 13.11 (b)(1)(iii), (b)(2), 13.28, 13.71 (a) and (b), and adding new Section 13.11 (b)(3), relating to a) alien application forms; b) extension of the term of alien restricted radiotelephone operator permits: c) deletion of the requirement for waiver of the geographical restriction for alien pilots; and d) elimination of requirement for Commission staff to certify commercial radio operator posting statements.

2. Authority for amendment is contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, and Section 552 of the Administrative Procedure Act. Because the amendments are procedural in nature, the prior notice and effective date provisions of Section 553 of the Administrative Procedure Act do not apply.

3. IT IS ORDERED, effective June 28, 1974, that Parts 0, 1 and 13 of the Rules be amended as set forth in the Appendix hereto.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX A

Parts 0, 1 & 13 of the Commissions Rules is amended as follows:

"§ 0.311 [Amended]

1. In § 0.311(a) subpar (13) is deleted and designated [Reserved].

2. In § 1.83(a) subpars (1) & (2) are amended, and subpar (3) deleted to read as follows:

"§ 1.83 APPLICATION FOR RADIO OPERATOR LICENSE.

"(a) * * *"

"(1) Restricted radiotelephone operator permit. (i) Applications for a Restricted Radiotelephone Operator Permit filed by U.S. Citizens or Nationals shall be on FCC Form 753-A entitled "Application for Restricted Radiotelephone Operator Permit by Declaration". (ii) Applications for Restricted Radiotelephone Operator Permits and requests for waiver of the nationality requirements pursuant to Section 303(1) of the Communications Act filed by an alien aircraft pilot (see § 13.4(c)) shall be filed on FCC Form 755 entitled "Application for Restricted Radiotelephone Operator Permit by Alien Aircraft Pilots".

"(2) All others. Application for a new, renewed, replacement or duplicate commercial operator license or for a verification card (FCC Form 758–F) shall be filed on FCC Form 756 entitled 'Application for Radio Operator License'.

* * * * * * *

3. In § 13.4, par (c) is amended to read as follows:

"§ 13.4 TERM OF LICENSES.

* * * * * * *

"(c) A commercial operator license or permit granted to an alien aircraft pilot under a waiver of the U.S. nationality provisions of Section 303(1) of the Communications Act will normally be issued for a term of five (5) years from the date of issuance. An operator license or permit issued to an alien shall be valid only if the operator continues to hold a valid aircraft pilot certificate issued by the Federal Aviation Administration or one of its predecessor agencies.

* * * * * * *

4. In § 13.11(b), subdivision (1)(iii) and subpar (2) & (3) are amended as follows:

"§ 13.11 PROCEDURE.

* * * * * * *

"(b) * * *

"(1) * * *

"(iii) When the applicant is an alien aircraft pilot (see § 13.4(c)), the application shall be submitted on FCC Form 755 in person or by mail to the Federal Communications Commission, Washington, D.C. 20554.

"(2) An application for an operator license or permit of any other class, or for a verification card, shall be submitted in person or by mail to the field office at which the applicant desires his application to be considered and acted upon, and which office will make final arrangements for conducting any required examination. Whenever an examination is required to be taken at a designated examination point away from a field office, the application shall be submitted in advance of the examination to the field office having jurisdiction over the area in which the examination is to be given.

"(3) The form entitled "Verification of Operator License or Permit" (FCC Form 759) may be obtained from any of the Commission's field offices. The certification under Part B of the form shall be completed by the licensee or general manager of the radio station where the statement is to be posted. When the FCC Form 759 is properly validated, it may be posted in lieu of the original radio operator license or permit when the holder of that license or permit is employed at more than one station."

5. Section 13.28 is amended to read as follows:

"§ 13.28 RENEWAL SERVICE REQUIREMENTS, RENEWAL EXAMINATIONS AND EXCEPTIONS.

"A restricted radiotelephone operator permit normally is issued for the lifetime of the holder and need not be renewed, EXCEPT that alien restricted radiotelephone operator permits are normally issued for a five year term and are normally renewable. A temporary limited radio telegraph second class operator license is not renewable. A license of any other class may be renewed without examination provided that the service record on the reverse side of the license (see §§ 13.91 to 13.94) shows at least two years of satisfactory service in the aggregate during the license term and while actually employed as a radio operator under the license.

"If this two-year renewal service requirement is not fulfilled, but the service record shows at least one year of satisfactory service in the aggregate during the last three years of the license term and while actually employed as a radio operator under that license, the license may be renewed upon the successful completion of a renewal examination, which may be taken at any time during the final year of the license term or during a one-year period of grace after the date of expiration of the license sought to be renewed. The renewal examination will consist of the highest numbered examination element normally required for a new license of the class sought to be renewed, plus the code test

(if any) required for such a new license. If the renewal examination is not successfully completed before expiration of the aforementioned one year period of grace, the license will not be renewed on any basis."

NOTE.—By order dated and effective April 4, 1951, the Commission temporarily waived the requirement of prior service as a radio operator or examination for renewal in the case of any applicant for renewal of his commercial radio operator license. This order is applicable to commercial radio operator licenses which expired after June 30, 1950 until further order of the Commission.

6. Section 13.71 is amended to read as follows:

"§ 13.71 ISSUE OF DUPLICATE OF REPLACEMENT LICENSES.

"(a) An operator whose license or permit has been lost, mutilated, or destroyed shall immediately notify the Commission. If the authorization is of the diploma form, a properly executed application for duplicate should be submitted to the office of issue. If the authorization is of the card form (Restricted Radiotelephone Operator Permit), a properly executed application for replacement should be submitted to the Federal Communications Commission, Gettysburg, Pa., 17325, EXCEPT for alien restricted radiotelephone operator permit applications, which must be submitted to Federal Communications Commission, Washington, D.C. 20554. In either case, the application shall embody a statement of the circumstances involved in the loss, mutilation, or destruction of the license or permit. If the authorization has been lost, the applicant must state that reasonable search has been made for it, and further, that in the event it be found, either the original or the duplicate (or replacement) will be returned for cancellation. If the authorization is of the diploma form, the applicant should also submit documentary evidence of the service that has been obtained under the original authorization, or a statement embodying that information.

"(b) The holder of any license or permit whose name is legally changed may make application for a replacement document to indicate the new legal name by submitting a properly executed application accompanied by the license or permit affected. If the authorization is of the diploma form, the application should be submitted to the office where it was issued. If the authorization is of the card form (Restricted Radiotelephone Operator Permit) it should be submitted to the Federal Communications Commission, Gettysburg, Pa. 17325, EXCEPT for alien restricted radiotelephone operator permit applications, which must be submitted to Federal Communications Commission, Washington, D.C. 20554."

APPENDIX B

FCC Form 755
September 1973

Federal Communications Commission

Form Approved
O.M.B. No. 52-R0168

APPLICATION FOR RESTRICTED RADIOTELEPHONE OPERATOR PERMIT BY ALIEN AIRCRAFT PILOTS

INSTRUCTIONS

A. Use typewriter or print in ink all information requested; sign name; date form and submit ONE copy to FCC, Washington, D. C. 20554.
B. Enclose fee with application (See FCC Form 76-K). DO NOT SEND CASH. Make check or money order payable to Federal Communications Commission.
C. Alien applicants MUST BE THE HOLDER OF A VALID U. S. FAA PILOT'S CERTIFICATE.

1. Full legal name of applicant (PRINT IN INK OR TYPEWRITE) (FIRST) (MIDDLE) (LAST)

2. Permanent Address (NO. & STREET)
CITY STATE COUNTRY ZIP CODE

3. Mailing Address (if different from item 2) (NO. & STREET)
CITY STATE COUNTRY ZIP CODE

4. Date of Birth
MONTH DAY YEAR

5. Birthplace
City .....
State .....
Country .....

6.
Country of which you are a citizen _____
Alien Registration No. _____
Port or Place of Entry _____
Date of Entry _____

7. I hereby apply for: (Check appropriate box)
☐ New Permit
☐ Renewal
☐ Replacement (Attach Original Permit)
☐ Duplicate. (Original Permit is lost or destroyed. A reasonable search has been made for the Permit. If found, will return it to FCC.)

8. Grade and No. of U. S. FAA Pilot's Certificate:
☐ Student
☐ Private
☐ Commercial
☐ Temporary
☐ Special Purpose
☐ Other (Specify) _____
No. of Certificate _____

CHECK "YES" OR "NO" TO THE FOLLOWING QUESTIONS AND PROVIDE INFORMATION REQUESTED.	YES	NO
9. Have you been convicted in the last ten years of any crime for which (i) the penalty imposed was a fine of $500 or more or (ii) for which you were sentenced to imprisonment for more than one year. (If the answer is "Yes", furnish details for each conviction giving date, nature of crime, court in which convicted, nature of sentence, and where sentence was served.) (Use separate sheet of paper to provide information.) →		
10. Do you have any of the physical defects listed below?		
Speech Impediment →		
Acute Deafness →		
Blindness →		
Other (Specify)		

11. Purpose for which operator permit is desired:

APPLICANT'S REQUEST FOR WAIVER AND CERTIFICATION

I hereby request a waiver of the U.S. Citizenship requirements pursuant to Section 303(1) of the Communications Act of 1934, as amended. I certify that I am the above named applicant; that the facts stated in the foregoing application and all exhibits attached thereto, are true of my own knowledge: that I have need for the permit herein applied for; that I can transmit and receive spoken messages in English; that I can keep at least a rough written station log in English or in some other language in general use that can be readily translated into English; that I am familiar with the provisions of treaties, laws, rules and regulations governing the authority granted under the permit herein applied for, that I understand that it is my responsibility to keep myself currently familiar with all such provisions; that I will preserve the secrecy of radio communications as required by law and that I will faithfully adhere to any requirements of law at all times, that this obligation is taken freely, without mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office obtained through my employment under this Permit if granted.

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND IMPRISONMENT U.S. CODE, TITLE 18, SECTION 1001

_____ (Signature of Applicant)

_____ (Date Signed)

FOR COMMISSION USE ONLY

(Issuance Date) _____

APPENDIX C

NOTICE: Sign this permit in space provided and cut from the large paper on lines indicated so it can be conveniently carried. This permit must be kept in your personal possession, or posted conspicuously, in accordance with the requirements of the Rules governing the particular class of station being operated.

(Cut on this line)

(Cut on this line)

FCC Form 753-D
1973

United States of America
FEDERAL COMMUNICATIONS COMMISSION
RESTRICTED RADIOTELEPHONE OPERATOR PERMIT
(ALIEN)

This permit, when countersigned by the permittee, and subject to the limitations prescribed on the reverse side hereof, authorizes

to operate licensed radio stations on aircraft for which this permit is valid under the Rules and Regulations of the Commission. It expires at 3 a.m. E.S.T., five years from the date of issuance, shown hereon. This permit is issued in conformity with paragraph 903, International Radio Regulations, Geneva 1959.

DATE OF ISSUANCE_____

_____
(Signature of Permittee

F. C. C. Washington, D. C.

(Cut on this line)

(Cut on this line)

(Form to be same size, format, color and texture as current 753-D)

WARNING

THIS PERMIT IS VALID ONLY IF THE HOLDER CONTINUES TO HOLD A VALID U.S. AIRCRAFT PILOT CERTIFICATE, and is valid only for such operation of radio stations on aircraft as is complementary to the holder's functions and duties as a pilot.

Make sure the radio station has a currently valid station license.

This permit does not authorize any adjustment of the transmitter that may affect the proper operation of the station.

MAYDAY is the international radiotelephone distress signal, distress messages have absolute priority.

PROHIBITIONS: Use of obscene, indecent or profane language
Unauthorized disclosure or use of messages
Superfluous, false,or deceptive signals or communications
Transmission of unassigned call signals

Observe requirements for transmission of station identification.

This permit must be conspicuously posted at the principal operating location or kept in your personal possession, depending upon the rules governing the particular class of station being operated.

KNOW YOUR RADIO LAWS, TREATIES, RULES AND REGULATIONS. FAILURE TO OBSERVE THEM MAY LEAD TO SUSPENSION OF THIS PERMIT.

APPENDIX D

FCC Form 759
December 1973

United States of America
Federal Communications Commission

VERIFICATION OF RADIO OPERATOR LICENSE OR PERMIT
(for additional posting)

When properly verified in Part B below by licensee or General Manager of the Radio Station where Radio Operator is employed, this form may be posted in lieu of the original document described in Part A when the holder of that original document is employed at more than one station.

PART A

Instruction to Radio Operator: Complete Part A of this form and submit it with your original operator license or permit to the licensee or general manager of the radio station where this form is to be posted. DO NOT SEND THIS FORM OR YOUR LICENSE TO FEDERAL COMMUNICATIONS COMMISSION FOR VERIFICATION.

I, _____ hereby certify that
Name of Radio Operator (must be same name appearing on original document)

(a) I hold the following described operator license or permit:
Title of document _____
Identifying number of document _____
Place where document was issued _____
Date on which document was issued _____
Date on which document will expire _____
Special Endorsement (if any) _____

(and)

(b) The document is posted at:
Radio Station _____
located at _____

(or)

is kept in my personal possession in order to meet the operator license requirements for portable or mobile radio station _____.
(call sign)

Signed _____ _____
(signature) (date)

PART B

I, _____
am the licensee/general manager of Radio Station(s) _____.
I hereby certify that I have personally examined the original license or permit issued to the operator named above, and that to the best of knowledge and ability the said document appears to be valid and authentic. This posting statement is to be used by the above named operator for operating the transmitting apparatus of this station and I assume the responsibility for having examined the original operator license or permit.

Signed _____ _____ _____
(signature) (title) (date)

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND IMPRISONMENT.
U.S. CODE, TITLE 18, SECTION 1001

APPENDIX E

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,
November 5, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C.
(Attention Secretary Mullins)

DEAR MR. MULLINS: It has been brought to our attention that FCC is considering a proposal to extend the validity of restricted radio/telephone operator permits issued to aliens for a period of 5 years instead of only one year, as at present.

AOPA wholeheartedly approves of this proposal which will benefit the more than four thousand aliens who are numbered in the ranks of FAA certificated pilots.

We shall appreciate receiving further details of this proposal at your convenience.

Yours truly,

BASIL G. MAILE,
Assistant Director,
Pilot Service Section,
Service and Reference Department.

APPENDIX F

AIR LINE PILOTS ASSOCIATION,
November 2, 1973.

The SECRETARY,
Federal Communications Commission,
Washington, D.C.
(Attention Field Engineering Bureau)

DEAR SIR: The Air Line Pilots Association respectfully requests that a modification be made to the requirement for alien pilots to renew their Restricted Radio Telephone Permit annually.

The several hundred alien airline pilots in this country find this requirement somewhat discriminating and difficult to comply with. The required forms are difficult to obtain, the fee is relatively expensive and the two-month wait for the permit make this cycle a considerable chore on an annual basis.

We would like to see the renewal period extended to at least five years. In addition, we strongly urge your taking early steps toward making the Radio Telephone License permanent for alien commercial pilots employed by United States Air Carriers and other forms of U.S. Air Commerce.

I am looking forward to hearing of your consideration of this matter.

Sincerely,

A. C. BONNER,
First Vice President.

FCC 74-170

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notification to
RADIO CHESAPEAKE, INC.
Concerning Operation of Contests Broadcast by Station WYRE, Annapolis, Md.

FEBRUARY 13, 1974.

RADIO CHESAPEAKE, INC.,
Radio Station WYRE,
Post Office Box 1551,
Annapolis, Md.

GENTLEMEN: This concerns the Commission's inquiry into the operations of Station WYRE, Annapolis, Maryland, with specific regard to the presentation of "The Last Contest". Your response dated June 18, 1973, has been considered concurrently with the results of the field investigation.

A field inquiry disclosed that WYRE conducted "The Last Contest" from January 29 through May 10, 1973. The contest was conducted in three segments. Phase I of "The Last Contest" was conducted from January 29 through March 28, 1973. During this portion of the contest the audience was instructed to call the station, using the telephone number normally used to make record requests, if the listener wanted to participate in the contest. The contest was conducted each hour from 7:00 to 5:00 p.m. during Phase I. The prizes during Phase I of the contest were record albums, tickets, T-shirts, etc. A certain caller was declared to be the winner, i.e. the third caller or the fifth caller, etc., announced in advance of the calls by the announcer on duty. A total of approximately $5,000 in prizes was awarded during Phase I.

Phase II of "The Last Contest" began on March 24, 1973, and ended on April 11, 1973. At the beginning of Phase II, listeners were asked to call in to a code-a-phone and describe prizes they would like to win. "The Last Contest" prize packages were then assembled by the WYRE staff. Prize packages included vacation trips, automobiles, jewelry, etc., and each prize package was budgeted at $3,000 or less. Each prize package was assigned a number and a description of it was broadcast. Listeners were told that a special secret telephone number would be broadcast and that at that time a designated caller (3rd, 5th, etc.) would be declared a winner. The winner would then specify which prize package, by number, he would like to receive as a prize. On April 11, 1973, the secret telephone number was broadcast and the fifth caller, as announced in advance, was declared the winner.

Phase III of "The Last Contest" began on April 12, and ended on May 10, 1973. Additional prize packages were described during Phase

III. Each prize package was budgeted at $5,000 or less. A new special secret telephone number was used during Phase III. The secret telephone number was broadcast on May 10, 1973, and it was then announced that the twelfth caller would be declared the winner, which in fact occurred.

A field inquiry disclosed that during Phase II and Phase III, listeners were told that a secret telephone number would be broadcast "maybe tomorrow or in five days or five minutes". However, during Phase II, the secret telephone number was not made operational until April 11, 1973—the day Phase II ended—and the secret telephone number was not made operational during Phase III until May 10, 1973—the day Phase III ended. Further, the field inquiry disclosed that a verbal order was issued on April 10, 1973, to install the secret telephone for Phase II and the order for the secret telephone for Phase III was issued on April 13, 1973. Thus, it appears the public was led to believe that the secret telephone number might be broadcast on many days when it would be impossible to complete a call to the secret telephone number and it appears that the licensee had knowledge that the information contained in the promotional announcements was false. Also WYRE referred to "two point three million dollars in prizes" offered in "The Last Contest," which was the total value of all prize packages offered during Phase I, Phase II, and Phase III of the contest. However, the budgeted value of each prize package during Phase I was of nominal value; during Phase II each prize package was budgeted at $3,000 or less, and during Phase III each prize package was budgeted at $5,000 or less. Thus, it appears the licensee misled the public to believe that $2.3 million could be won, whereas the maximum amount possible to win in any of the three contests was $5,000, since only one prize package was to be awarded for each contest.

According to Chesapeake and Potomac Telephone Company officials, when the secret telephone number was broadcast at the end of Phase III at approximately 5:15 p.m. on May 10, 1973, 72 per cent of their Annapolis customers encountered dial tone delays from 5:15 to 5:20 p.m. and probably all customers encountered dial tone delays during that time period. Telephone customers in nearby areas also encountered dial tone delays ranging from 10.6 per cent to 42.5 per cent, according to manual readings by the telephone company. Thus, telephone service for approximately 37,000 customers in the Annapolis area was disrupted for approximately five minutes.

The field inquiry disclosed that telephone officials had met with a representative of WYRE prior to Phase II and reached a verbal agreement that a winner would be declared on the fourth or fifth call; conversation with the preceding callers would be kept at a minimum; and the contest would be broadcast about 5:00 p.m. when office calling would be at its lowest level. This, it was explained by telephone officials was necessary to prevent disruption of telephone service. This agreement proved satisfactory on April 11, 1973, during Phase II. Telephone officials assumed a similar procedure would be in effect during Phase III. However, the field inquiry disclosed that during Phase

III, on May 10, 1973, the *twelfth* caller was declared the winner and that conversation with the preceding callers may have been longer than during Phase II. Thus, the question is raised whether the licensee was sincere in trying to avoid telephone service disruption during Phase III or was trying to exploit such disruption for publicity purposes.

In the Commission's Public Notice released November 7, 1961, entitled "Licensee Responsibility with Respect to the Broadcast of False, Misleading or Deceptive Advertising", FCC 61–1316, it was stated:

> With respect to advertising material the licensee has the additional responsibility to take all reasonable measures to eliminate any false, misleading or deceptive matter.

In *KOLOB Broadcasting Company, Inc.* (KCCC), 36 FCC 2d 586 (1972), at page 587, the Commission said:

> The Commission requires that licensees that conduct contests adequately supervise and control the contests to assure that they are conducted fairly and are substantially as represented in announcements to the public.

It appears that in your failure to establish proper procedures for conducting "The Last Contest" and your broadcast of false or misleading announcements regarding it you have failed to exercise the degree of responsibility expected of a licensee.

This matter is being made part of the permanent file of Station WYRE for consideration in connection with future operations of the station.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

FCC 74-227

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 2 AND 91 OF THE COMMISSION'S RULES TO PERMIT THE USE OF FREQUENCIES IN THE BAND 90–110 kHz IN THE RADIOLOCATION SERVICE ON A SECONDARY BASIS TO THE RADIONAVIGATION SERVICE	RM-2253

ORDER

(Adopted March 7, 1974; Released March 12, 1974)

BY THE COMMISSION:

1. The Commission is aware from discussion with industry and other Government agencies that increased resource exploration in the offshore areas of the United States has created a requirement for a more reliable long range radiolocation service to enable greater accuracy in the charting and relocating of potential mineral deposits. The United States Coast Guard has advised the Commission that within recent months several oil companies have discussed the desire to use enhanced LORAN type radiolocation techniques in support of offshore drilling activities. The techniques involve the use of signals in the 90–110 kHz band for improved accuracy and coverage. We have been told that small portable transmitters are available commercially which can be used for this purpose.

2. In a filing dated June 18, 1973, Offshore Navigation, Inc. (ONI), an existing licensee in the Industrial Radiolocation Service, submitted an application to the Commission for the authorization of LORAN type radiolocation land stations on a secondary basis in the 90–110 kHz band in the Industrial Radiolocation Service. ONI suggested that the authorization could be granted under the intent of existing rules, but that if the Commission decided otherwise, either the rules should be waived to permit ONI's specific operation or rule making initiated looking toward a regular provision for the radiolocation service in this band on a secondary basis.

3. Subsequent to ONI's filing, the Lorac Service Corporation (Lorac) also an existing licensee in the Industrial Radiolocation Service petitioned the Commission on September 6, 1973 to initiate rule making to provide for industrial radiolocation on a secondary basis in the 90–110 kHz band (RM-2253). The enhanced LORAN-C type radiolocation activity that Lorac wishes to introduce to the 90–110 kHz band would be on a secondary, non-interference basis to extant LORAN operations within the band, with assurance of protection effectuated through coordination and supervision of activities by the

U.S. Coast Guard. Lorac contends that through appropriate regulation of certain station operational parameters (e.g. phase code and repetition rates, effective radiated power, and on air time, etc.) that the desired Loran protection could be realized.

4. Comments relevant to Lorac's proposal were filed by ONI and Decca Survey Systems, Inc. (DECCA). Both entities essentially agreed with Lorac's request that provision should be made for radiolocation on a secondary basis within the 90–110 kHz band. Decca specifically emphasized that proper authority should come from waivers of existing rules while ONI's contention was that the Commission should take any action it deems appropriate to achieve the sought after objective.

5. Nationally, the frequency band 90–110 kHz is allocated exclusively to the radionavigation service. Primary use of the band is for LORAN–C stations operated by the Coast Guard although certain non-Government radionavigation stations may be authorized on a secondary basis under the provisions of footnote US18 to the National Table of Frequency Allocations, § 2.106 of the Commission's Rules. Recent tests conducted by the Coast Guard in the Gulf of Mexico have shown that enhanced LORAN type radiolocation techniques of the kind proposed by ONI can provide the necessary accuracy and range and can be utilized concurrently with LORAN–C radionavigation operations in the 90–110 kHz band without harmful interference to the latter.

6. Consequently, the Coast Guard and the Interdepartment Radio Advisory Committee (IRAC) have indicated concurrence with the proposed secondary radiolocation use subject to adequate protection being provided to the LORAN radionavigation service. They have recommended in this regard that the radiolocation stations be limited to pulsed (as distinct from continuous wave) emission, with specified pulse repetition rates; that all applications for radiolocation operations be subject to case-by-case coordination with the IRAC; and that any license for such operations reflect the present and future priority of the LORAN radionavigation system and require the immediate termination of transmissions of the radiolocation station if any interference is caused to the radionavigation service.

7. Therefore, based on the above information, it appears that the stated radiolocation requirements can be satisfactorily accommodated in the 90–110 kHz band without interference to the LORAN radionavigation system. We also believe that a rule amendment is preferable to the waiver approach, based on an anticipated broad application of the technique, and Sections 2.106 and 91.604 of the Rules are being amended accordingly. Applications will be considered on a case-by-case basis through the regular IRAC/FCC coordination mechanism. As indicated in the appended rules, only pulsed systems of the LORAN type will be authorized, subject to such conditions as may be necessary to protect the LORAN radionavigation system.

8. Because there are no existing non-Government operations in the band which could be affected by the above-mentioned rule amendments and the action represents an additional provision for non-Government

radio services, the prior notice, public comments, and effective date procedures of 5 U.S.C. 553 are unnecessary. Authority for these rule changes is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

9. In view of the foregoing, IT IS ORDERED that, effective March 19, 1974, Parts 2 and 91 of the Rules are amended by revision of Sections 2.106 and 91.604 as shown in the attached appendix. IT IS FURTHER ORDERED that this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Parts 2 and 91 of Chapter I of Title 47 of the Code of Federal Regulations are amended to read as follows:

"§ 2.106 [AMENDED]

1. In § 2.106, footnote US104 is amended to read as follows:

"US104 The LORAN Radionavigation System has priority in the band 90–110 kHz in the United States and Possessions. Radiolocation land stations making use of LORAN type equipment may be authorized to both Government and non-Government on a SECONDARY SERVICE basis for offshore radiolocation activities of offshore industries only at specific locations and subject to such technical and operational conditions (e.g., power, emission, pulse rate and phase code, hours of operation), including on-the-air testing, as may be required on a case-by-case basis to insure protection of the LORAN Radionavigation System from harmful interference and to insure mutual compatibility among radiolocation operators. Such authorizations to stations in the radiolocation service are further subject to showing of need for service which is not currently provided and which the Government is not yet prepared to render by way of the radionavigation service."

2. In § 91.604(a), the table is amended to add the frequency band 90–110 kHb, and par (b)(19) is added to read as follows:

"§ 91.604 FREQUENCIES AVAILABLE.

"(a) * * *

"Frequency or band	Class of station(s)	Limitation(s)
kHz		
70 to 90	Radiolocation land or mobile	1
90 to 110	Radiolocation land	1, 19
110 to 130	Radiolocation land or mobile	1
* * *	* * *	*

"(b) * * *

"(19) This band is limited to radiolocation land stations in accordance with footnote US104 for offshore radiolocation activities."

FCC 74-261

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REREGULATION OF RADIO AND TELEVISION BROADCASTING

ORDER

(Adopted March 13, 1974; Released March 15, 1974)

BY THE COMMISSION:

1. As a result of the continuing study by its Task Force on the re-regulation of broadcasting, the Commission has under consideration the matter of amending certain provisions in Parts 0, 1, 73 and 74 of its rules and regulations.

2. These amendments up-date certain rules, and delete parts of others which are no longer applicable.

3. The following rule changes will be made for the reasons stated:

(a) In Section 0.314 "Authority delegated to the Engineers in Charge", paragraph (b) refers to the delegated authority of EIC's to act on requests for temporary permission to operate standard and FM broadcast stations with licensed operators of lesser grade than required by the rules, or for waivers of other technical requirements of operators at such stations. The rule, as it is stated, inadvertently omits reference to operators at noncommercial educational FM stations.

(1) This omission of a reference to noncommercial educational FM stations could incorrectly be interpreted to mean that this type station is excluded from making such requests or asking for such waivers. This is not the case. Changes are made naming this service in the rules along with standard and FM.

(b) In Section 1.547 "Application for permission to use lesser grade operators", paragraph (a) refers to applications for temporary permission to operate standard and FM broadcast stations with licensed operators of lesser grade than normally required by the Commission's rules. The rule, as it is stated, inadvertently omits reference to noncommercial educational FM stations.

(1) The omission could be incorrectly interpreted to mean that this type station is excluded from making such applications. This is not the case. Changes are made in the rule to specify this service along with standard and FM stations.

(c) When a licensee applies for permission to use a lesser grade operator than normally required by the rules, he must submit, in writing, a request including specific information (§ 1.547(c)(4)). The licensee must show "that at least one first class operator will be employed full time at the station . . .". All AM, FM, and noncommercial educational FM stations are not required to employ a first class operator full time. Section 1.547(c)(4) is amended to conform with existing rules concerning operator requirements.

104-030—74——7

Amendment is also made which allows for appointment of a substitute operator, on a pro-tem, non-fulltime basis in the event the station's regularly employed operator is incapacitated. The substitute adequately fulfills the station operator requirement for the purposes of the showing.

(1) The operator showing now conforms to the operator's rules in the AM, FM and noncommercial educational FM services. The amendment, allowing a substitute operator for the incapacitated regular operator, clarifies the requirements for substituting temporarily for a station operator who is off duty due to illness or injury.

(d) The requirement that the chief operator at a station to which temporary permission has been granted to operate with licensed operators of a lesser grade than normally required by Commission rules, must mail written certification to the Engineer in Charge of the district regarding the lesser grade operator is deleted. (Section 1.547(d).) This certification sets forth the operator's name and license number, and states he has the ability to perform the normal operation of the station.

(1) Such certification are not needed and elimination of the requirement relieves the Commission and the licensee of an unnecessary paper work burden.

(e) Sections 73.52(a); 73.267(c); 73.567(c) and 73.689(b)(3) state that, in emergencies, AM, FM, noncommercial educational FM and TV stations may be operated at reduced power for a period of up to 10 days without further authority from the Commission. If authorized power cannot be restored within 10 days, written request to the Commission in Washington, D.C. must be made by the licensee for formal authorization to continue lower power operation until the problem is remedied. A change in the rules is made here which permits the permittee or licensee to operate at lower power for 30 days without further authority from the Commission, provided he notifies the Commission not later than the 10th day of lower power operation. In the event that normal power is restored prior to the expiration of the 30 day period, the permittee or licensee will so notify the Commission of this date.

(1) This change relieves the FCC of the administrative detail of formally authorizing, in writing, continued operation on lower power upon receipt of 10 day notifications. The staff will save many work hours via this relief.

(f) Sections 73.71(b); 73.261(b) and 73.651(a)(3) state that AM, FM and TV stations may, in the event it is impossible to adhere to their operating schedules due to situations beyond their control, limit or discontinue operation for 10 days without further authority from the Commission. The rules further state that if the licensee finds it impossible to return to his normal schedule within 10 days, request for authority must be made from the Commission in Washington, D.C. for such additional time as may be deemed necessary to remedy the cause of the problem. A modification in the rules is made here which permits licensees to limit or discontinue their operating schedules for a period of not more than 30 days without further authority from the Commission, provided notification is sent to the Commission no later than the 10th day of the limited or discontinued schedule. During such period the licensee must strictly adhere to the requirements of the station license pertaining to the lighting of antenna structures. Further, the licensee must notify the Commission, in writing, of the date of return to his authorized operating schedule if such occurs prior to the expiration of the 30 day period.

(1) This change relieves the Commission of the administrative detail of formally authorizing, in writing, limited operation or discontinued operation upon receipt of 10 day notifications. The staff will save many work hours via this relief.

(g) Under the existing rules, a station's chief operator must review each day's operating log within prescribed time periods (24 or 72 hours) and sign and date it after completion of such review. (Sections 73.93(h)(4)(iv); 73.265(d)(5)(iv) and 73.565(d)(5)(iv).) The rules are amended to include the time of the chief operator's review, as well as the date and his signature.

(1) The Field Operations Bureau has been unable to determine if the review of the station's operating log by the chief operator has been within the period prescribed. The addition of the time of the log review will enable field inspectors to accurately ascertain if this time provision of the rule is being carried out.

(h) Sections 73.113(e); 73.283(e) and 73.583(e) are amended to include the time of the chief operator's review of the operating log as well as the date and his signature thereon.

(1) There is a cross reference in these three Operating Log sections to rules regarding Operator Requirements in Sections 73.93(h)(4)(iv); 73.265(d)(5)(iv); 73.565(d)(5)(iv)—(as amended in (g) above). The notation of the time of the chief operator's review of the logs, added to his signature and the date of the review, conforms to the requirements in these revised sections.

(i) Sections 73.114(b) and 73.284(b) are amended to correct a reference to Sections 73.93(e) and 73.265(e) respectively, concerning the weekly inspections of transmitting systems and monitoring equipment.

(1) The references should be to Sections 73.93(j) and 73.265(h) respectively.

(j) Section 73.310(a) is amended to delete the paragraph heading "*FFM broadcast station*" and the definition therein. In its place is inserted the corrected heading *FM broadcast channel*, followed by a revised definition.

(1) The definition *FFM broadcast station* is a misprint and is removed from the rules. The heading of the section is corrected to read *FM broadcast channel*. The old definition is deleted and a more exact definition is inserted in its place.

(k) In Subpart E—Aural Broadcast STL and Intercity Relay Stations, Section 74.533(b)(4) provides that whenever an unattended aural broadcast STL or intercity relay station is in operation appropriate observations shall be made at the receiving end of the circuit, at intervals not exceeding one hour, by the operator. This is changed to require the appropriate observations at intervals not exceeding three hours.

(1) With the performance and reliability of equipment in general use today, we find no need for more frequent observations than once every three hours. Also, this modification conforms with the change from every 30 minute meter readings to three hour meter readings in the operating logging rules in the AM, FM, non-commercial educational FM and TV services.

(l) Section 73.603(a) is amended to correct the frequency band for television channel 69 from 800–809 MHz to 800–806 MHz.

(1) The designation, as shown in the present rule, is incorrect.

(m) In Subpart F—Television Auxiliary Broadcast Stations, Section 74.635(a)(4) states that one of the conditions pertaining to unattended operation of TV intercity relay stations and TV STL stations, is the requirement that appropriate observations shall be made at the receiving end of the circuit, intervals not exceeding one hour, by the operator. This is changed to require the appropriate observations at intervals of not more than three hours.

(1) There is no need for more frequent observations than once every three hours in view of the performance and reliability of equipment in use today. This modification conforms with the change from 30 minute meter readings to three hour meter readings in the operating log rules in the AM, FM, noncommercial educational FM and TV services.

4. Amendments hereby adopted are editorial revisions, and deletions and relaxations of existing rule provisions which we consider no longer necessary. We believe they will inure to the benefit of many and to the detriment of none, and that they will better serve the public interest. Therefore, prior notice of rulemaking and public procedure thereon, are unnecessary, pursuant to the Administrative Procedure and Judicial Review provisions of 5 U.S.C. 553(b)(3)(B).

5. Therefore, IT IS ORDERED, That, pursuant to Sections 4(i) and 303(j) and (r) of the Communications Act of 1934, as amended, Parts 0, 73, and 74 of the Commission's Rules and Regulations are amended as set forth in the attached Appendix, effective April 29. 1974.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

1. Section 0.314(b) is amended to read as follows:

"§ 0.314 AUTHORITY DELEGATED TO THE ENGINEERS IN CHARGE.

* * * * * * *

"(b) For temporary permission to operate standard, FM and noncommercial educational FM broadcast stations with licensed operators of lesser grade than normally required by the Commission's rules or for waiver of other technical requirements of operators at such stations.

* * * * * * *

2. Section 1.547(d) is deleted and (a) and (c)(4) are amended to read as follows:

"§ 1.547 APPLICATION FOR PERMISSION TO USE LESSER GRADE OPERATORS.

"(a) Application for temporary permission to operate standard, FM and noncommercial educational FM broadcast stations with licensed operators of a lesser grade than normally required by the Commission's rules shall be submitted to the Engineer in Charge of the radio district in which the station is located. Such permission will be granted for periods not to exceed 60 days if a proper showing is made, as set forth in this section, and may be renewed upon request only upon the making of an adequate similar showing. A request for extension of the permission previously granted may be granted upon a showing setting forth what continuing efforts have been made to obtain licensed operators of a grade normally required. The Engineer in Charge may terminate this permission in the absence of a satisfactory showing in the written report that adequate efforts have been made to obtain such operators, or for other good reason in the judgment of the Engineer in Charge.

* * * * * * *

"(c)(4) A showing that at least one operator of the class required pursuant to Sections 73.93(b), 73.265(b), or 73.565(b) (1), (2), (3) will be employed full time, or on a contract basis for those stations using contract operators pursuant to 73.93(c), 73.265(c) or 73.565(c), and that such operator will be available on call at all times in the event of equipment failure. If this operator is incapacitated temporarily, appointment of a qualified operator on a pro-tem

non-full time basis is allowed. He must be available on call at all times in the event of equipment failure."

* * * * * * *

3. Section 73.52(a) is amended to read as follows:

"§ 73.52 ANTENNA INPUT POWER; MAINTENANCE OF.

"(a) The actual antenna input power of each station shall be maintained as near as is practicable to the authorized antenna input power and shall not be less than 90 percent nor greater than 105 percent of the authorized power; except that if, in an emergency, it becomes technically impossible to operate with the authorized power, the station may be operated with reduced power for a period of not more than 30 days without further authority from the Commission, provided that notification is sent to the Commission in Washington, D.C. not later than the 10th day of the lower power operation. In the event normal power is restored prior to the expiration of the 30 day period, the permittee or licensee will so notify the Commission in Washington, D.C. of this date. If causes beyond the control of the permittee or licensee prevent restoration of authorized power within the allowed period, informal written request shall be made to the Commission in Washington, D.C. no later than the 30th day for such additional time as may be deemed necessary.

* * * * * * *

4. Section 73.71(b) is amended to read as follows:

"§ 73.71 MINIMUM OPERATION SCHEDULE.

* * * * * * *

"(b) In the event that causes beyond the control of a permittee or licensee make it impossible to adhere to the operating schedule in paragraph (a) of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the Commission, provided that notification is sent to the Commission in Washington, D.C. no later than the 10th day of limited or discontinued operation. During such period, the permittee or licensee shall continue to adhere to the requirements of the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the permittee or licensee will so notify the Commission in Washington, D.C. of this date. If causes beyond the control of the permittee or licensee make it impossible to comply within the allowed period, informal written request shall be made to the Commission in Washington, D.C., no later than the 30th day for such additional time as may be deemed necessary."

5. Section 73.93(h)(4)(iv) is amended to read as follows:

"§ 73.93 OPERATOR REQUIREMENTS.

* * * * * * *

"(h)(4)(iv) A review of completed operating logs to determine whether technical operation of the station has been in accordance with the rules and terms of the station authorization. After review, the chief operator shall sign the log and indicate the date and time of such review. If the review of the operating logs indicates technical operation of the station is in violation of the rules or terms of the station authorization, he shall promptly initiate corrective action. The review of each day's operating log shall be made within 24 hours, except that, if the chief operator is not on duty during a given 24 hour period, the logs must be reviewed within 2 hours after his next appearance for duty. In any case, the time before review shall not exceed 72 hours.

* * * * * * *

6. Section 73.113(e) is amended to read as follows:

"§ 73.113 OPERATING LOG.

* * * * * * *

"(e) If required by § 73.93(h)(4)(iv), each completed operating log shall bear a signed notation by the station's chief operator of the results of the review of that log, and show the date and time of such review."

7. Section 73.114(b) is amended to read as follows:

"§ 73.114 MAINTENANCE LOG.

* * * * * * *

"(b) Upon completion of the inspection required by § 73.93(j), the inspecting operator shall enter a signed statement that the required inspection has been made noting in detail the tests, adjustments, and repairs which were accomplished in order to insure operation in accordance with the provisions of this subpart and in the current instrument of authorization of the station. The statement shall also specify the amount of time, exclusive of travel time to and from the transmitter, which was devoted to such inspection duties. If complete repair could not be effected, the statement shall set forth in detail the items of equipment concerned, the manner and degree in which they are defective, and the reason for failure to make satisfactory repairs.

* * * * * * *

8. Section 73.261(b) is amended to read as follows:

"§ 73.261 TIME OF OPERATION.

* * * * * * *

"(b) In the event that causes beyond the control of a permittee or licensee make it impossible to adhere to the operating schedule in paragraph (a) of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the Commission, provided that notification is sent to the Commission in Washington, D.C. no later than the 10th day of limited or discontinued operation. During such period, the permittee or licensee shall continue to adhere to the requirements of the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the permittee or licensee will so notify the Commission in Washington, D.C. of this date. If the causes beyond the control of the permittee or licensee make it impossible to comply within the allowed period, informal written request shall be made to the Commission in Washington, D.C., no later than the 30th day for such additional time as may be deemed necessary."

9. Section 73.265(d)(5)(iv) is amended to read as follows:

"§ 73.265 OPERATOR REQUIREMENTS.

* * * * * * *

"(d)(5)(iv) A review of completed operating logs to determine whether technical operation of the station has been in accordance with the rules and terms of the station authorization. After review, the chief operator shall sign the log and indicate the date and time of such review. If the review of the operating logs indicates technical operation of the station is in violation of the rules or terms of the station authorization, he shall promptly initiate corrective action. The review of each day's operating logs shall be made within 24 hours, except that, if the chief operator is not on duty during a given 24 hour period, the logs must be reviewed within 2 hours after his next appearance for duty. In any case, the time before review cannot exceed 72 hours.

* * * * * * *

10. Section 73.267(c) is amended to read as follows:

"§ 73.267 OPERATING POWER, DETERMINATION AND MAINTENANCE OF.

* * * * * * *

"(c) *Reduced power.* In the event it becomes technically impossible to operate with authorized power, the station may be operated with reduced power for a period of not more than 30 days without further authority from the Commission, provided that notification is sent to the Commission in Washington, D.C. not later than the 10th day of the lower power operation. In the event normal power is restored prior to the expiration of the 30 day period, the permittee or licensee will so notify the Commission in Washington, D.C. of this date. If causes beyond the control of the permittee or licensee prevent restoration of authorized power within the allowed period, informal written request shall be made to the

Commission in Washington, D.C. no later than the 30th day for such additional time as may be deemed necessary."

11. Section 73.283(e) is amended to read as follows:

"§ 73.283 OPERATING LOG.

* * * * * * *

"(e) If required by § 73.265(d)(5)(iv), each completed operating log shall bear a signed notation by the station's chief operator of the results of the review of that log, and show the date and time of such review."

12. Section 73.284(b) is amended to read as follows:

"§ 73.284 MAINTENANCE LOG.

* * * * * * *

"(b) Upon completion of the inspection required by § 73.265(h), the inspecting operator shall enter a signed statement that the required inspection has been made, noting in detail the tests, adjustments, and repairs which were accomplished in order to insure operation in accordance with the provisions of this subpart and the current instrument of authorization of the station. The statement shall also specify the amount of time, exclusive of travel time to and from the transmitter, which was devoted to such inspection duties. If complete repair could not be effected, the statement shall set forth in detail the items of equipment concerned, the manner and degree in which they are defective, and the reasons for failure to make satisfactory repairs.

* * * * * * *

13. In Section 73.310 the definition *FM broadcast station* is deleted and a new definition is inserted in lieu thereof as follows:

"§ 73.310 DEFINITIONS.

"(a) *Frequency modulation.*

* * * * * * *

"*FM broadcast channel.* A band of frequencies 200 kHz wide and designated by its center frequency. Channels for FM broadcast stations begin at 88.1 MHz and continue in successive steps of 200 kHz's to and including 107.9 MHz.

* * * * * * *

14. Section 73.565(d)(5)(iv) is amended to read as follows:

"§ 73.565 OPERATOR REQUIREMENTS.

* * * * * * *

"(d)(5)(iv) A review of completed operating logs to determine whether technical operation of the station has been in accordance with the rules and terms of the station authorization. After review, the chief operator shall sign the log and indicate the date and time of such review. If the review of operating logs indicates technical operation of the station is in violation of the rules or terms of the station authorization, he shall promptly initiate corrective action. The review of each day's operating logs shall be made within 24 hours, except that, if the chief operator is not on duty during a given 24 hour period, the logs must be reviewed within 2 hours after his next appearance for duty. In any case, the time before review cannot exceed 72 hours.

* * * * * * *

15. Section 73.567(c) is amended to read as follows:

"§ 73.567 OPERATING POWER; DETERMINATION AND MAINTENANCE OF.

* * * * * * *

"(c) *Reduced power.* If a station licensed for transmitter power output greater than 10 watts finds it technically impossible to operate with authorized power, the station may be operated with reduced power for a period of not more than 30 days without further authority from the Commission, provided that notification is sent to the Commission in Washington, D.C. not later than the 10th day of the

lower power operation. In the event normal power is restored prior to the expiration of the 30 day period, the permittee or licensee will so notify the Commission in Washington, D.C. of this date. If causes beyond the control of the permittee or licensee prevent restoration of authorized power within the allowed period, informal written request shall be made to the Commission in Washington, D.C. no later than the 30th day for such additional time as may be deemed necessary."

16. Section 73.583(e) is amended to read as follows:

"§ 73.583 OPERATING LOG.

* * * * * * *

"(e) If required by § 73.565(d)(5)(iv), each completed operating log shall bear a signed notation by the station's chief operator of the results of the review of that log, and show the date and time of such review."

17. Section 73.603(a) is amended to read as follows:

"§ 73.603 NUMERICAL DESIGNATION OF TELEVISION CHANNELS.

(a)

Channel No.	*Frequency band (MHz)*
* * *	* * *
69	800–806
* * *	* * *

18. Section 73.651(a)(3) is amended to read as follows:

"§ 73.651 TIME OF OPERATION.

* * * * * * *

"(a)(3) In the event that causes beyond the control of a permittee or licensee make it impossible to adhere to the operating schedule in paragraph (a) of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the Commission, provided that notification is sent to the Commission in Washington, D.C. no later than the 10th day of limited or discontinued operation. During such period, the permittee or licensee shall continue to adhere to the requirements of the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the permittee or licensee will so notify the Commission in Washington, D.C. of this date. If the causes beyond the control of the permittee or licensee make it impossible to comply within the allowed period, informal written request shall be made to the Commission in Washington, D.C., no later than the 30th day for such additional time as may be deemed necessary.

* * * * * * *

19. Section 73.689(b)(3) is amended to read as follows:

"§ 73.689 OPERATING POWER.

* * * * * * *

"(b)(3) *Reduced power.* In the event it becomes technically impossible to operate with authorized power, the station may be operated with reduced power for a period of not more than 30 days without further authority from the Commission, provided that notification is sent to the Commission in Washington, D.C. not later than the 10th day of the lower power operation. In the event the normal power is restored prior to the expiration of the 30 day period, the permittee or licensee will so notify the Commission in Washington, D.C. of this date. If causes beyond the control of the permittee or licensee prevent restoration of authorized power within the allowed period, informal written request shall be made to the Commission in Washington, D.C. no later than the 30th day for such additional time as may be deemed necessary.

* * * * * * *

20. Section 74.533(b)(4) is amended to read as follows:

"§ 74.533 REMOTE CONTROL AND UNATTENDED OPERATION.

* * * * * * *

"(b) (4) Whenever an unattended aural broadcast STL or intercity relay station is in operation, appropriate observations shall be made at the receiving end of the circuit at intervals not exceeding 3 hours by a person designated by and under the control of the licensee and need not be a licensed operator under Part 13 (Commercial Radio Operators) of our rules.

* * * * * * *

21. Section 74.635(a) (4) is amended to read as follows:

"§ 74.635 UNATTENDED OPERATION.

* * * * * * *

"(a) (4) In the case of television intercity relay stations and television STL stations, appropriate observations shall be made at intervals not exceeding 3 hours during the period of their operation, at the receiving end of the circuit, by a person holding a valid first or second class radiotelephone operator license who shall immediately institute measures sufficient to assure prompt correction of any condition of improper operation that is observed; and

* * * * * * *

FCC 74R-90

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
ROSEMOR BROADCASTING CO., INC., STATESBORO, GA.	Docket No. 19887 File No. BP-19424
SOUTHEAST RADIO, INC., STATESBORO, GA.	Docket No. 19888
For Construction Permits	File No. BP-19489

MEMORANDUM OPINION AND ORDER

(Adopted March 8, 1974; Released March 14, 1974)

BY THE REVIEW BOARD:

1. The above-captioned mutually exclusive applications for a new standard broadcasting station in Statesboro, Georgia, were designated for hearing by Broadcast Bureau (B) Order 12352, released December 7, 1973, 38 FR 34535. On January 2, 1974 Rosemor Broadcasting Co., Inc. (Rosemor) filed a motion requesting the Review Board to add the following issues:

1. Whether Southeast Radio Inc.'s (Southeast) application complies with Section 73.150(b)(1)(i), and whether its recent amendment warrants a waiver thereof.

2. Whether Southeast had reasonable assurance that its transmitter site would be available to it and if not whether it misrepresented or was less than candid concerning the availability thereof in its application.

3. Whether Southeast's application violates the Commission's cross-interest policy, and whether Southeast and its leading principal are chargeable with an intentional or otherwise wrongful failure to disclose the existence of the offending cross-interest.

4. Whether Southeast's only full time participant has failed to comply with the Commission's cable television rules.

5. Whether Southeast and its stockholders, or some of them, concealed or were less than candid concerning other business interests called for by Form 301, and whether Southeast's stock ownership is accurately reported.

6. Whether Southeast has shown itself to be financially qualified.

7. Whether Southeast's application is defective because certain exhibits are not dated and whether all exhibits were certified according to the Commission's requirements.[1]

[1] The Board also has before it comments on the motion to enlarge issues, filed by the Broadcast Bureau on January 23, 1974; an opposition, filed by Southeast on January 23, 1974; a reply, filed by Rosemor on February 4, 1974; a motion for leave to supplement reply, and a supplement, filed on February 20, 1974, by Rosemor; and a petition for leave to file supplement to opposition to motion to enlarge issues and a supplement to opposition to petition to enlarge issues, filed March 5, 1974, by Southeast. Neither supplemental pleading is authorized by the Commission Rules and the showings made in the petitions do not justify a departure from the orderly procedure contemplated by the Rules. These petitions to accept supplemental pleadings will therefore be denied and the supplemental pleadings dismissed.

2. In support of its request for an issue concerning compliance with Section 73.150(b)(1)(i), Rosemor notes that the rule proscribes what had previously been a common practice of using an arbitrary assumed loss resistance of two ohms in describing theoretical directional antenna patterns and prescribes instead the use of one ohm assumed loss unless an additional technical showing is made justifying the use of a greater value. Rosemor points out that Southeast in describing its directional antenna pattern has ascribed two ohms of assumed loss resistance for each of the elements in its four element directional antenna array, and argues that Southeast has failed to provide an adequate technical showing to warrant the use of the greater value. The requested issue will be denied. In response to an inquiry from the Commission's Broadcast Bureau, Southeast provided a technical justification for the use of the higher value. The engineering showing, submitted over the signature of Elizabeth L. Dahlberg, a registered professional engineer whose qualifications are well known to the Commission, states, *inter alia*, that a detailed study of numerous similar four-tower in-line arrays of existing stations has been carried out and it has been found that the measured RMS in each instance was smaller than the RMS using an assumed two ohm loss; thus by using the two ohm loss factor, the theoretical directional pattern more nearly approaches the actual pattern for such arrays than would a theoretical pattern assuming a one ohm loss for each element of the array. The Board is satisfied as is the Broadcast Bureau that this technical showing justifies the use of the two ohm loss factor in Southeast's proposed directional antenna, and petitioner has provided no allegations which might warrant for further inquiry into the showing.

3. To support the requested site availability issue, Rosemor notes that Southeast failed to include an option agreement with its application, and submits the affidavit of a Statesboro, Georgia, attorney to the effect that Mrs. Annie J. Allen and Glennis A. Hires, from whom Southeast proposes to purchase the antenna site are not the owners of record of that property; rather the property is owned by the estate of Mrs. Allen's father. In opposition, Southeast submits a copy of an option to purchase from Mrs. Annie J. Allen, signed August 15, 1973, which gives Southeast an irrevocable right to purchase the land at any time for a period of one year with provision for two successive renewals for $500 per year. As evidence of Mrs. Allen's right to grant the option, Southeast relies on an "agreement for division" dated July 26, 1973, signed by the living daughters of J.M.D. Jones, which specifically agrees to transfer 68.24 acres of land, including the transmitter site, to Mrs. Allen and her daughter, Mrs. Hires, as Mrs. Allen's one-fifth interest in the estate's remaining real property. Southeast has also attached a copy of a warranty deed signed by the three other living daughters of J.M.D. Jones, dated September 7, 1973, which purports to convey the above described land to Mrs. Allen and her daughter Glennis A. Hires, which deed was recorded in the Office of the Clerk Superior Court on September 25, 1973. Moreover, Southeast has also submitted a ratification agreement signed by Mrs. Glennis A. Hires executed on September 25, 1973. Therefore, Southeast contends, it has a valid option to purchase land for its transmitter site. In reply, Rosemor alleges that the option is not valid because neither the

agreement for division of July 26, 1973, nor the warranty deed, is signed by all of the heirs of J.M.D. Jones. In support of this allegation, Rosemor submits an affidavit of a Statesboro lawyer to the effect that Jones had a fifth daughter who predeceased both him and his wife, leaving three surviving daughters, and alleges that, under the Georgia law, these daughters share in the estate in a representative capacity. Rosemor contends that since these heirs have not signed either the agreement for division or the deed, Mrs. Allen and Mrs. Hires do not have a clear title to the proposed antenna site.

4. The Board is satisfied that Southeast has reasonable assurance that the proposed site will be made available to it. It is well established that an applicant is not required to have a legally binding contract making the site available to it; nor is it necessary to establish clear title to the proposed site. All that the Commission requires is reasonable assurance that the site will be available to the applicant.[2] In view of the documentary evidence filed by Southeast, it is clear that Mrs. Allen has a substantial ownership interest in the property, that she has agreed to sell to Southeast and that Southeast intends to purchase the property. No useful purpose will be served by speculating concerning contingencies which might develop should the optionor be unable to deliver unencumbered title to the proposed site and Rosemor has given us nothing more on this point than speculation. It has not, for example, been alleged that the remaining heirs would object to the proposed disposition of the property, if in fact they have an interest. Moreover, in the past the Commission and the Board have declined to interfere in questions involving State law when no challenge has been made in the State courts, and the determination is one that is more appropriate for resolution by State courts than by the Commission. See, e.g. *Wilkes County Radio*, 10 FCC 2d 175, 11 RR 2d 341 (1967). This principle is, in our view, applicable here. Finally, petitioner's assertion that Southeast knew of the other heirs and attempted to mislead the Commission in this regard is too speculative to warrant further inquiry. Accordingly, the requested issue, will be denied.

5. The third issue requested by Rosemor concerns the Commission's cross-interest policy. Rosemor contends that Mr. A. Joe McGlamery, who is the president, a director and the largest shareholder in Southeast, was at the time the application was filed employed by FM station WZAT, Savannah, Georgia, as an account executive for the Statesboro area, that such employment is contrary to the Commission's cross-interest policy, and that Southeast's failure to report McGlamery's association with WZAT raises questions of possible intentional misrepresentation. Rosemor relies on an advertising circular published by WZAT and the affidavit of a Statesboro merchant who received that circular to establish McGlamery's association with WZAT. In opposition, Southeast contends that McGlamery was never employed by WZAT. It concedes, however, that pursuant to an agreement entered into between McGlamery on behalf of Advertising Production Associates, an advertising agency in which he is a partner, and Station WZAT,

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[2] *Lorenzo W. Milan and Jeremey D. Lansman*, 4 FCC 2d 610, 7 RR 2d 765 (1966); *North American Broadcasting Co., Inc.*, 15 FCC 2d 984, 989, 15 RR 2d 367, 374 (1969); *Edward G. Atsinger III*, 30 FCC 2d 493, 500, 22 RR 2d 236, 234 (1971).

McGlamery agreed to represent WZAT in the Statesboro area. However, Southeast submits a letter from WZAT dated October 9, 1973 terminating this arrangement. Southeast explains that the Advertising Production Associates business relationship with WZAT was not reported in the application because McGlamery was advised by his counsel that he need not list the names of stations to which his agency had sold advertising for its clients, and that he believed the WZAT arrangement should be treated in the same way; thus he did not include it in Southeast's application.

6. The Board is satisfied that there is no basis for a cross-interest issue since McGlamery is not now in any way associated with Station WZAT. While the contract with WZAT probably should have been reported in the application,[3] the necessity for reporting the information is not entirely clear, we have no reason to doubt the veracity of Southeast's explanation for its failure in this regard, and it appears to be an isolated instance of negligence. Therefore, this matter is not likely to be of decisional significance, and no issue with respect to Southeast's failure to include information concerning McGlamery's association with WZAT is warranted.

7. Rosemor's fourth requested issue is based upon its allegations that McGlamery is a director and shareholder of Statesboro CATV, which company was required by the Rules of the FCC to file an annual report on FCC Form 325 which was due July 31, 1973, and that the report was not filed until August 2, 1973.[4] Rosemor contends that since McGlamery is a director of that corporation he must assume responsibility for its failure to comply with the Commission's Rules. The requested issue will be denied. Even if we assume that McGlamery was personally responsible for the day to day conduct of the affairs of the CATV company, its three day delay in filing its annual report would be of no decisional significance in the disposition of this proceeding.

8. Rosemor also contends that certain shareholders of Southeast failed to disclose their earlier interests in Info-Fun of Statesboro, Inc., which was subsequently merged with Southeast. It argues that since A. Joe McGlamery, James B. Franklin and R. Earl Dabbs were shareholders of Statesboro Info-Fun, Inc., their failure to note this ownership on Table 2 or in Southeast's Exhibit 2 requires an inquiry concerning this failure. Moreover, Southeast contends that since McGlamery signed Southeast's application there is basis for at least an inference of willful withholding of information concerning the prior business interests of McGlamery, Franklin and Dabbs. Rosemor also notes that upon an examination of the articles of merger of Info-Fun into Southeast it appears that the total shares of Southeast stock is incorrectly reported in its application. In opposition, Southeast states that the prior interest of McGlamery, Franklin and Dabbs in

[3] Paragraph 19 of Section II of Form 301 inquires as follows: Does application or any party to this application have now, or has applicant or any such party had, any interest in, or connection with, the following: "(a) Any standard, FM, or television broadcast station? (b) Any application pending before the Commission? (c) Any application which has been denied by the Federal Communications Commission? (d) Any broadcast station the license of which has been revoked?"

[4] Rosemor's speculation that Statesboro CATV may also have failed to file other reports required by this Commission is no basis for the addition of issues in an adjudicated proceeding. See Sec. 1.229(c) of the Commission's Rules.

Info-Fun was not reported because that corporation was a shell corporation which transacted no business, had no bylaws, and filed no annual reports; its only activity was as a vehicle preparatory to entering the radio broadcasting business in Statesboro. Southeast also explains, supported by the affidavits of McGlamery and Franklin, that at the time of merger, Southeast already owned 80% of the stock of Info-Fun; thus, its report of the total number of outstanding shares accurately reflects the relationship of the several shareholders to the corporation. The Board is satisfied that the preliminary organizational steps taken by Info-Fun and Southeast which resulted in the present corporate structure of Southeast were adequately disclosed in its application. Moreover, the Board is satisfied by Southeast's explanation that it fairly reported the stock ownership in its corporation. In these circumstances, the issue requested by Rosemor does not appear to be warranted. Rosemor's contention that Info-Fun was limited by its charter to CATV business does not appear to us to be pertinent since no business was transacted by that corporation.

9. Rosemor next requests a financial qualification issue with respect to Southeast. In support thereof it contends that since Southeast's letter of credit requires the personal endorsement of each of the stockholders of Southeast and there is no evidence submitted with the application that the stockholders will endorse the corporate note an issue is required. Rosemor contends that the lending agency might not be aware that a broadcast station license may not be transferred or assigned without approval of the Commission and thus it may not be willing to lend the sum required by Southeast. Rosemor also argues that Southeast's balance sheet indicates that the corporation owes $30,0000.00, evidenced by notes to stockholders, and contends that since these notes are payable in full with principal and interest on August 15, 1978, and since there are no other details as to the terms of these notes, they may be evidence of real control or an ownership interest rather than a *bona fide* loan. Further, Rosemor argues that Southeast's balance sheet shows an asset of $56,000.00 for radio station development costs and contends that this asset, for which there is no accompanying explanation, may have been used as a basis to persuade investors to enter the corporation or the bank to make its loan. Finally, Rosemor argues that Southeast is grossly undercapitalized and that even if it survives its first year of operation, it most certainly will not be able to continue its operation more than three years (citing *AC Broadcasters*, 10 FCC 2d 796, 11 RR 2d 359 (1967)).

10. The requested financial issue will be denied. Southeast has submitted minutes of a stockholders' meeting which evidences the willingness of each of the shareholders to endorse the corporate obligation. It has also submitted a letter from the bank indicating that it has full knowledge that Commission consent is required for assignment or transfer of control of a radio station license, and that, despite this knowledge, the bank is willing to make the loan. Rosemor's allegations concerning the effect of the $30,000.00 shareholder's loan and the $56,000.00 entry for radio station developmental costs are speculative and not supported by affidavits of persons with knowledge of facts. In

the absence of some adequately supported factual allegation of misconduct or misrepresentation, these entries, which are not relied on by the applicant to establish its financial qualifications form no basis for the addition of an issue.[5] Rosemor's contention that Southeast is underfinanced does not warrant the addition of the issue. Based on Rosemor's own figures, it is clear that Southeast has sufficient funds available to enable it to construct its proposed station and to operate it for one year without reliance on income.[6] It is not necessary for Southeast to defer any of its obligations which would be due within its first year of operation. Nor is there any indication that its obligations within the second year would prove insurmountable. Therefore, *AC Broadcasters*, *supra*, is inapposite.

11. Rosemor has also requested an issue concerning Southeast's failure to date certain exhibits. The Board's examination of Southeast's application and the attached exhibits, most of which are properly dated, in light of the affidavit of Mr. McGlamery which explains Southeast's failure to date the other exhibits, satisfied the Board that no issue concerning this matter is warranted.

12. Accordingly, IT IS ORDERED, That the petitions for leave to supplement reply and supplement opposition, filed in February 20, 1974, and March 5, 1974, by Rosemor Broadcasting Company, Inc. and Southeast Radio, Inc. ARE DENIED, and the supplements ARE DISMISSED; and that the motion to enlarge issues, filed January 2, 1974, by Rosemor Broadcasting Company, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[5] See Sec. 1.229(c) of the rules.
[6] *Ultra Vision Broadcasting Co.*, 1 FCC 2d 544, 5 RR 2d 343 (1965); *Ultra Vision Broadcasting Co.*, 11 FCC 2d 394, 12 RR 2d 137 (1968); *KBLI Inc.*, 17 FCC 2d 693, 16 RR 2d (1969).

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
STEPHEN J. PENZICK
Concerning the Equal Opportunities Provision of Section 315 Against Station WLTV, Miami, Fla.

MARCH 14, 1974.

STEPHEN J. PENZICK, Esq.,
Miami, Fla.

DEAR MR. PENZICK: This is in response to your letter of complaint on behalf of Evelio S. Estrella in which you allege that television station WLTV, Miami, Florida, violated the equal opportunities provision of Section 315, Communications Act of 1934.

You stated that licensee extended to complainant, a candidate for the office of Mayor of Miami, Florida, in the November 6, 1973 election, 15 minutes of air time on Channel 23 on October 14, 1973; that licensee extended to successful candidate Maurice Ferre 30 minutes uninterrupted air time on November 4, 1973, two days prior to the election; that licensee announced Mr. Ferre's appearance by "on and off special announcements" several hours prior to said appearance; that complainant requested an additional 15 minutes air time, and this request was denied; that Mr. Ferre made indirect reference to complainant during said appearance; and that such appearance did not fall within the exclusionary sections of Section 315(a) (1), (2), (3) and (4) of the Communications Act.

In response to an inquiry by the Commission on your complaint, the licensee stated that complainant appeared with Evaristo Marina, Candidate for Commissioner of the City of Miami, on October 14, 1973, at the request of licensee on its regularly scheduled news interview program, ANTE EL 23; that on Sunday, November 4, 1973, Maurice Ferre, candidate for Mayor, appeared at licensee's request as a guest on ANTE EL 23; that you contacted licensee's general manager later the same evening to request equal opportunity of 15 minutes for complainant; that your request was denied for the reason that, in licensee's opinion, ANTE EL 23 was a regularly scheduled news interview program exempt from the equal opportunities provisions of Section 315; that ANTE EL 23 had been telecast weekly since the beginning of 1972; that interviewees were selected for said program by licensee based on their newsworthiness; that licensee exercised complete control over the interview; that no prepared statement was permitted and questions were neither pre-disclosed nor could they be by-passed; that a review of the program disclosed no reference, direct or indirect, to complainant; and that the several hours of "on and off special announce-

ments" were "paid political spots on behalf of, and paid for, by Mr. Ferre" and contained no mention of the appearance on ANTE EL 23.

The correspondence between licensee and complainant indicates that there is no dispute as to whether complainant and Maurice Ferre were legally qualified candidates for a public office. Each, as such, was invited to appear on ANTE EL 23. The primary question is whether ANTE EL 23 is a bona fide news interview program exempt from the equal opportunities provision of Section 315(a).

This Commission, in finding a program to be a bona fide news interview program, stated:

> In so ruling, the Commission assumes that your statement that the program is regularly scheduled indicates that it is scheduled on a continuing basis and is not limited to the current election year. We also assume that the questions asked by your Washington correspondent are solely those of the licensee or interviewer and are not disclosed to the interviewee in advance; that the interviewee does not use a prepared statement and is accorded no veto power over the questions to be asked; . . . *Miami Valley Broadcasting Corp.*, 24 FCC 2d 460 (1970).

Based on the undisputed information supplied by licensee, it appears that ANTE EL 23 is a bona fide news interview program to which the equal opportunities provision of Section 315, Communications Act of 1934, does not apply.

It further appears that the "several hours of on and off special announcements" were paid political spots on behalf of candidate Ferre. There is no evidence presented by you to the contrary, and you have not shown that candidate Estrella was refused the opportunity to purchase any type of political advertising on the station.

Accordingly, for the reasons stated above, no further action on your complaint is warranted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

104-030--74----8

FCC 74-213

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notification to
SJR COMMUNICATIONS, INC.
Concerning Operation of Contests Broadcast by WYSP, Philadelphia, Pa.

FEBRUARY 27, 1974.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

SJR COMMUNICATIONS, INC.,
(Licensee of Radio Station WYSP, Philadelphia, Pa.),
New York, N.Y.

GENTLEMEN: This concerns the Commission's field investigation into the operation of Station WYSP(FM), Philadelphia, Pennsylvania, with specific reference to the broadcast of the "Best of Broadway" contest. Evidence adduced in the investigation raised questions, to which the licensee responded by letter dated October 1, 1973. A memorandum dated August 24, 1973, concerning a subsequent investigation of WYSP conducted by licensee's counsel was incorporated by reference in the licensee's response.

According to the evidence and the licensee's response, the "Best of Broadway" contest was created by former WYSP general manager Gerald Salatino (known professionally as Jerry Michaels) and a former disk jockey, Bruce Smallwood.[1] The contest was conducted in the fall of 1972. The licensee submitted the following description of the contest, which is uncontradicted by the evidence:

> Each Monday evening between 7:00 P.M. and 8:00 P.M. WYSP formerly broadcast a program featuring the score of a Broadway musical. In order to test audience interest and response to that particular program, Messrs. Michaels and Smallwood collaborated on a special "Best of Broadway" contests . . . Messrs. Smallwood and Michaels cooperated to the exclusion of all other station personnel in formulating the contest rules and overall general operation. "Best of Broadway" listeners were directed to send a postcard to WYSP listing their name and address. A random drawing would then be made two weeks after the cut-off date with the winner to receive a trip to New York as the grand prize.
>
> At Michaels' request Smallwood produced and recorded the spot announcement advertising the contest. This announcement was broadcast . . . two or three times during each broadcast for two or three weeks.

In a complaint to the Commission it was alleged that the outcome of the contest had been predetermined in violation of Section 509 of

[1] After the investigation, the licensee requested and received Salatino's resignation as general manager of WYSP. Smallwood left the station's employ before the investigation was conducted.

the Communications Act of 1934, as amended.[2] It was alleged that a random drawing was not held as advertised, but instead Salatino arbitrarily awarded the prize to his father-in-law.

Evidence adduced in the investigation revealed that about 80 to 90 entries were received in response to the announcements advertising the contest. Disk jockey Smallwood stated that Salatino took custody of the entries on the day scheduled for the drawing, carried them to his office, and remained there a short while. Salatino then allegedly left his office and entered the office of WYSP program director, Frank X. Feller (where Smallwood and Feller were present), placed a piece of paper face down on Feller's desk and stated to Smallwood "there is your winner," or words to that effect. Feller remembered that Salatino came into the office and placed the paper on the desk (but saw nothing written thereupon), but Feller did not recall any words spoken by Salatino. Smallwood said the name "John Regan"[3] was written on the paper, and that Smallwood announced this name as the winner of the contest. Smallwood said that since he knew Regan was Salatino's father-in-law, he felt that Salatino had "rigged" the contest by choosing Regan as the winner without conducting a drawing. Smallwood said he discussed his suspicion with Feller with a view toward reporting the incident to the Commission.[4]

The facts adduced in the Commission's investigation were substantiated by licensee's counsel's investigation. Licensee's "thorough search" of its offices failed to discover any record of a winner of the contest. The licensee stated that even though "Smallwood contends that [Salatino] 'rigged' the contest . . . [Salatino] steadfastly maintains that it was Smallwood who selected the winner of the contest. However, neither [Salatino] or any other staff member has any recollection of the winner's name, or could corroborate the fact that Regan was the announced winner." Although Salatino orally denied that he

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[2] Section 509 provides in pertinent part as follows:

(a) It shall be unlawful for any person, with intent to deceive the listening or viewing public—

* * * * * * *

"(3) To engage in any artifice or scheme for the purpose of prearranging or predetermining in whole or in part the outcome of a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance.

"(4) To produce or participate in the production for broadcasting of, to broadcast or participate in the broadcasting of, to offer to a licensee for broadcasting, or to sponsor, any radio program, knowing or having reasonable ground for believing that, in connection with a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance constituting any part of such program, any person has done or is going to do any act or thing referred to in paragraph . . . (3) of this subsection.

"(5) To conspire with any other person or persons to do any act or thing prohibited by paragraph . . . (3), or (4) of this subsection, if one or more of such persons do any act to effect the object of such conspiracy."

(b) for the purposes of this section—

"(1) The term 'contest' means any contest broadcast by a radio station in connection with which any money or any other thing of value is offered as a prize or prizes to be paid or presented by the program sponsor or by any other person or persons, as announced in the course of the broadcast.

"(2) The term 'the listening or viewing public' means those members of the public who, with the aid of radio receiving sets, listen to or view programs broadcast by radio stations."

(c) Whoever violates subsection (a) shall be fined not more than $10,000 or imprisoned not more than one year, or both.

[3] Regan is Salatino's father-in-law.

[4] The licensee noted in its report of investigation that Feller, upon receiving Smallwood's report, informed Smallwood that he did not believe Salatino capable of such an act, and thereafter took no action.

rigged the contest, upon advice of his counsel he refused to sign any statement about the matter.

On the basis of the information presently available, there is insufficient evidence to make a determination that the winner of "The Best of Broadway" contest was predetermined with intent to deceive the listening public, in violation of Section 509 of the Communications Act, nor do we believe that an evidentiary hearing would be likely to adduce sufficient additional evidence to resolve this question.

It appears, however, that the licensee has been seriously derelict in its responsibilities with regard to supervision of the contest and maintenance of records regarding it. For example, the licensee possesses no rules used in the contest, no copies of announcements broadcast about it and no records as to who, if anyone, was awarded the prize. As we stated in *KOLOB Broadcasting Company, Inc.* (*KCCC*), 36 FCC 2d 586, 587 (1972):

> The Commission requires that licensees that conduct contests adequately supervise and control the contests to assure that they are conducted fairly and are substantially as represented in announcements to the public.

It is requested that within 20 days of this date you submit a statement as to your future policies and procedures designed to insure that contests broadcast by WYSP are presented under adequate controls and supervision and in compliance with applicable statutes and Commission policies.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

FCC 74-236

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF STEARNS COUNTY BROADCASTING CO., LICENSEE OF RADIO STATION KASM, ALBANY, MINN.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted March 7, 1974; Released March 13, 1974)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Memorandum Opinion and Order adopted March 13, 1973, addressed to Stearns County Broadcasting Company, licensee of Radio Station KASM, Albany, Minnesota, assessing a forfeiture of $500 for having an improperly licensed operator in charge of the transmitter, and (2) the licensee's application for mitigation or remission of forfeiture dated March 30, 1973.

2. In the application for mitigation or remission of forfeiture, licensee stated:

> 1. I particularly object to the word "repeated" violation. According to the records I have on file at KASM, the official notice of violation was dated on November 17, 1970. I do not understand the significance of the October 10, 1970. I can find no record of receiving a citation on that date.
>
> 2. According to the transmitter logs, on file at KASM, there were no further violations of Section 73.93, after November 17th, 1970.
>
> 3. I'm more concerned about having the negligence citation on my record, than I am about the $500.00 fine. I feel that I am as conscientious and concerned about operating within the rules, as anyone else in the business.

3. It appeared from the facts in this case that the improperly licensed operator in question had been in charge of the routine operation of the transmitter during periods which included from October 10, 1970 to November 17, 1970 from 6:00 a.m. to 8:00 a.m. and 9:30 a.m. to 11:45 a.m., on Mondays through Fridays, and from 8:00 a.m. until 12 noon on Sundays. In our Memorandum Opinion and Order adopted March 13, 1973, we found that this constituted repeated violation of Section 73.93 of the Rules. Section 503(b)(1) of the Communications Act of 1934, as amended, provides that each day during which such violation occurs shall constitute a separate offense, and in this case the improperly licensed operator was on duty for many days as set forth above. That the violations may not have been repeated after issuance

of the Official Notice of Violation is but one of many mitigating factors which we previously took into account. Considering all of the circumstances in this case, we are not persuaded to remit or mitigate the forfeiture.

4. In view of the foregoing, IT IS ORDERED, That the application for mitigation or remission of forfeiture IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-80

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SUMITON BROADCASTING CO., INC., SUMITON, ALA. For Construction Permit	Docket No. 18204 File No. BP-17108

APPEARANCES

Ray R. Paul and *John Gordon Smith*, on behalf of Sumiton Broadcasting Co., Inc.; *Rainer K. Kraus* [1] and *Thomas H. Wall*, on behalf of Hudson Millar, Jr. and James Jerdan Bullard, Intervenors; and *Virgil C. Tacy*, *Jay L. Witkin* and *John T. Kelly*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted March 4, 1974; Released March 12, 1974)

BY THE REVIEW BOARD: NELSON AND KESSLER. BOARD MEMBER PINCOCK CONCURRING IN RESULT.

1. This case [2] would have remained a profoundly insignificant one to all except its immediate parties had the late Administrative Law Judge Charles J. Frederick [3] in his Initial Decision, released May 26, 1972, made adequate basic and ultimate findings of fact and conclusions which would have, on their face, established that the Judge (a) first, considered all facts and circumstances concerning each specific overt act of Millar and Bullard, the Intervenors herein and the principals and/or agents of WKUL, Cullman, Alabama, underlying the

[1] Mr. Kraus represented the Intervenors throughout this proceeding, including filing of the exceptions and a brief directed against the adverse conclusions of the Initial Decision relating to the strike conduct of Millar and Bullard. Subsequently, he withdrew, and Mr. Wall entered his appearance and presented the oral argument on behalf of the Intervenors.

[2] Originally, this case also involved the application of Dan Cole Mitchell (Mitchell) and Leon A. Murphree (Murphree), d/b as Cullman Music Broadcasting Company (Cullman), seeking use of 1540 kHz in Cullman, Alabama. This application was originally tendered for filing on May 26, 1965, returned by the Commission to the applicant by letter dated November 18, 1965, and was resubmitted to the Commission on April 14, 1966. In the interim, the mutually exclusive application of Sumiton Broadcasting Co., Inc. (Sumiton) was tendered for filing on January 24, 1966. The additional background procedural matters relating to these applications are set forth in the Preliminary Statement of the Initial Decision which is adopted by the Board, and will not therefore be repeated here. However, it is to be noted that approximately five and one-half years after the filing of the Cullman application, Mitchell and Murphree abandoned further prosecution of it. Thereafter, they appeared and testified at the hearing with respect to the strike issue, without personal counsel.

[3] It should be noted that the late Judge succeeded then Judge Thomas H. Donahue upon his retirement, in this proceeding. At that time the testimony in this record had been taken and completed. Subsequently, by Order, dated July 28, 1970 (FCC 70M-1051), the Chief Administrative Law Judge designated the late Judge to succeed Judge Donahue who retired on July 24, 1970. At that time, Intervenors had a choice of seeking a new trial if they then believed, as they now assert, that demeanor findings which can be made only by the trier-of-fact who observed the witnesses, are an indispensable element of a fair and just decision. They did not do so.

strike issue in this case, including their extraordinary background and experience in the radio field, their denials of the charges of strike conduct, and the reasonableness or unreasonableness of their explanations of their conduct; and (b) then reached independent conclusions relating to the weight and sufficiency of such evidence with respect to the chain of events, if any, resulting therefrom to support an adverse or favorable conclusion under the strike issue, standing alone, and without regard to sharp testimonial conflicts of evidence. Thereafter, the late Judge could have resolved the sharp testimonial conflicts on the basis of his prior independent conclusion, and then determined the weight and sufficiency of the totality of the evidence, based upon his independent conclusion and such corroborative evidence, to support an adverse or favorable conclusion of the strike issue.

2. Instead of following this illuminating path, however, the late Judge failed to detail all of the facts and circumstances surrounding Intervenors' specific overt acts. He also, in most part, ignored and did not attempt to resolve questions relating to the reasonableness or unreasonableness of Intervenors' explanations of their conduct, in light of all the facts and circumstances surrounding each of their specific overt acts. He also, by implication, rejected some of Intervenors' explanations without detailing his reasons for such rejection. Similarly, with respect to sharp testimonial conflicts of evidence, he accepted one version *vis-a-vis* the other, without stating his reasons, and by a purely cumulative path, he reached the following ultimate conclusions:

(a) Millar and Bullard, the Intervenors and principals or agents of WKUL, Cullman, Alabama, were intent in blocking a new facility on the 1540 kHz frequency in Cullman;

(b) The application of Sumiton Broadcasting Co., Inc. (Sumiton) for a new station on the 1540 kHz frequency in Sumiton, Alabama, was filed for the principal purpose of obstructing or delaying the establishment of another standard broadcast facility in Cullman, Alabama, on the 1540 kHz frequency;

(c) The Sumiton filing on the 1540 kHz frequency was planned and executed through the efforts of Millar and Bullard without the knowledge of any of the principals of Sumiton; and

(d) Irrespective of this latter conclusion, the Sumiton application is required to be denied because of the filing of a "forged" affidavit by one of its former principals, and of its failure to comply with Section 1.65 of the Commission's Rules.

3. Briefly described, the two sharp conflicts [4] of testimonial evidence relating to the strike issue revolve around the following questions:

(a) Whether Millar, at a meeting he initiated in early June 1965, with Dan C. Mitchell, principal stockholder of the Cullman ap-

[4] As shown by Intervenors' exceptions, their purported resolution of these conflicts, in most part, is based upon remote and suppositious inferences and arguments of purported hostility or bias on the part (a) of Mitchell, a principal of the now dismissed Cullman application, and (b) of Sims, a former employee of Millar, who served, for a period of approximately 30 days, as a conduit for Intervenors in conveying information, purportedly, to the original investors in the Sumiton company. In these respects, we emphasize that we do not—and need not—dwell longer here on Millar's and Bullard's unsubstantiated (a) attacks relating to alleged hostility and bias of these witnesses, and (b) counter-attack that, in effect, the principals of the Cullman application are the "strikers" and not them. See note 21, *infra*, and our rulings on Intervenors' exceptions set forth in the Appendix attached hereto.

plicant and one of Millar's largest advertisers on WKUL, threatened, harassed, or at the least attempted to dissuade Mitchell from further prosecution of the Cullman application which had been tendered for filing on May 26, 1965;

(b) Whether Millar, at a meeting he initiated with Thomas W. Sims, a former longtime employee of Millar, held on November 29, 1965, (i) admitted to Sims that his purpose in instigating the filing of the Sumiton application on 1540 kHz was to block the Cullman application on 1540 kHz (which had been returned to Mitchell, as defective, on or about November 26, 1965) when it was refiled; (ii) cautioned Sims that it was necessary to file the Sumiton application at the earliest possible date to achieve this purpose; (iii) cautioned Sims to treat their conversations as secret; and (iv) told Sims that his (Millar's) engineer, "would take care of the engineering portion of the application."

4. The Judge also accorded substantial weight to the facts as reported in an inter-office memorandum dictated by Millar's and Sumiton's consulting engineer, on or about November 30, 1965, describing a telephone conversation with Millar [5] relating to the Sumiton application, despite the fact that (a) Millar denied some of the significant facts reported in the memorandum [6] (Tr. 774–77), and (b) the engineer subsequently retracted or modified, as inaccurate, some of the facts in the memorandum disputed by Millar, when he testified in this proceeding, four years later. Here, again, the Judge accorded substantial weight [7] to the disputed facts by accepting the version set forth in the memorandum, without (a) first reaching an independent conclusion relating to the weight and sufficiency of the other facts of record to support a favorable or adverse conclusion, standing alone, on the strike issue; and (b) then, determining whether the facts stated in the memorandum, or the facts as modified by Millar's and the engineer's testimony, corroborate a prior independent conclusion. The inter-office memorandum reads, as follows:

Re: WKUL
11/30/65

Millar asked that we proceed with the preparation of the application for *1540 KC* in *Sumiton, Alabama*. Mr. Millar will not be the principal. There are a group

[5] Intervenors, in effect, seek credit for their voluntary act of producing this memorandum. In light of the circumstances surrounding the production of this document, we can accord them no credit. As shown by the transcript of record, this memorandum was produced several days after the hearing commenced on December 8, 1969 in Birmingham, when it was evident that this engineer would appear as a witness in this proceeding. (Tr. 736.) At that time, counsel for Intervenors stated that he had found the memorandum in the engineer's office file "earlier this year." In January 1969, there was pending before the then Presiding Judge various motions for production of documents filed by Cullman on January 10, 1969. (See Tr. 733–34.)

[6] The transcript further indicates that although Intervenors' counsel discussed the substance of the memo with Millar when it was discovered, it was not until December 4, 1969, that Millar actually saw this document. (Tr. 734–35.)

[7] The Judge's conclusion that the engineer's memorandum of his telephone conversation with Millar is the best evidence of the substance of that conversation, is founded on an erroneous conception of the Best Evidence rule. The memorandum was, in fact, a record made in the regular course of business, and therefore admissible as an exception to the Hearsay rule. Standard office procedure in the engineering consulting firm called for keeping "a memo on everything" (Tr. 1263), which constitutes a record made in the regular course of business. In addition, the memorandum was made within a reasonable time after the phone conversation. (Tr. 1240.) However, the memorandum is merely a statement about the occurrence; it is not the occurrence itself, and the Best Evidence rule is not applicable. Therefore, the circumstances surrounding the making of the memorandum and the conflicts over the facts therein stated must be considered in determining the weight to be attached to the memorandum. See 28 U.S.C. Sec. 1732 (1970); 5 Wigmore, Evidence Secs. 1517–1561 (3d ed. 1940, Supp. 1972).

of four or five who are filing this application. *Millar asks that we proceed.* We will get site information such as photos and property sketches, business and industrial areas within the community and so forth. *It is desirable to get the application filed before the prior Cullman applicant refiles an application that had been returned. In any event, the Sumiton group has been considering this frequency for many months* and will proceed regardless of what action the Cullman applicant may make. (Emphasis supplied.)

5. Oral argument was held before a panel of the Board on September 13, 1973. At this juncture, it is to be noted that counsel for Sumiton and for the Intervenors, Millar and Bullard, by their respective exceptions, briefs and oral argument, challenge the legal validity of the Initial Decision. Sumiton addresses its attack solely to the "forged affidavit" and Section 1.65 aspects of the Initial Decision, while Intervenors attack that portion of the Initial Decision relating to the strike issue. To the extent that these attacks are directed to the Judge's erroneous methodology of reaching his conclusions, the Board is constrained to agree with them. In the landmark case of *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), the Supreme Court made clear that the substantiality of evidence required to support a decision is not "merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence. . . ." However, in all other respects, we disagree with the prolific attacks of the Intervenors, including their attack on the Judge's adoption of the Bureau's proposed findings and conclusions. If the Bureau's proposed findings and conclusions had not been infected with these same fundamental defects, we would not find that the mere "copying", standing alone, is objectionable.

6. However, contrary to counsel's position at the oral argument, the sharp testimonial conflicts described at paras. 3 and 4, *supra*, are not required to be resolved on the basis of demeanor findings because there is an abundance of evidence all adverse to the Intervenors upon which an adverse independent conclusion is required, quite apart from these sharp testimonial conflicts. As will be shown below, an evaluation of all the facts and circumstances relating to Intervenors' specific overt acts, their denials of the strike charges, the unreasonableness of their explanations, and the chain of events resulting therefrom, provide stringent proof of their misconduct. Thereafter, on the basis of well-established principles of law, a trier-of-fact can turn to sharp testimonial conflicts, and determine what version corroborates a prior independent conclusion, and when this is done in the instant case, there is not only an abundance of proof of misconduct, there is proof beyond doubt. See *Prattville Broadcasting Co.*, 5 FCC 2d 601, 602–603 (1966), citing a long line of authority.

7. For these reasons, we reject counsel's argument that demeanor findings are a legal prerequisite [8] to a valid decision, and that a re-

[8] Although counsel did not explain his theory, it is the Board's view assuming *arguendo* that Judge Donahue in the instant case had issued the Initial Decision and had made favorable demeanor findings with respect to Millar and Bullard, that such favorable demeanor findings could not withstand the clear and convincing facts which are detailed in our Decision here. As indicated by the Supreme Court in *Universal Camera Corp.* v. *NLRB*, *supra*, "the findings of the Examiner are to be considered along with consistency and inherent probability of testimony." In *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955), the Supreme Court reversed the Court of Appeals, and held inaccurate the lower court's view that an Examiner's findings as to demeanor of a witness are not to be

mand of this proceeding would be required if we resolved the strike issue adversely to Intervenors. We also cannot agree with counsel's assertions at the oral argument that, assuming *arguendo*, demeanor findings are not essential, as a matter of law, such findings, nevertheless, are needed to accord this Board reasonable assurance that it has reached a just and fair result. Quite to the contrary, it is the Board's view, on the basis of our reading and analyzing this record, that this case may not only be fairly judged by the unmistakably clear and convincing evidence [9] in this record, this case compels such a judgment.[10] In short, we are not confronted here with the task of resolving seemingly irreconcilable contradictions by interested witnesses where the facts are not otherwise patently clear. We, therefore, do not find ourselves, in light of the clear and convincing evidence in this record, entangled in the dilemma of the late Judge when he stated in his Initial Decision that:

> It is always trying upon the conscience of a substitute Hearing Examiner to take a "cold" record and, not having the privilege of confronting principals and witnesses, come to a fair conclusion that he can "live with." This is such a case and such a circumstance.

8. In view of the more illuminating approach to this case required by well-established principles of law, this case once again illustrates patently the burden and responsibility of this Board—because of gross inadequacies of all of the documents under review—(a) to make a *de novo* review of a record, in minute detail; (b) to make a detailed analysis of the evidence; and (c) to prepare an adequate and reasoned decision which, on its face, will assure other reviewing authorities that there is clear, unmistakable evidence in this record to support the path we have taken. In this case, such an adequate and reasoned decision necessitates reliance on lengthy excerpts of the evidence in order to reveal patently (a) what has occurred in this proceeding, and (b) Intervenors' erroneous proposed findings. In accepting this burden of

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overruled by a Board without a "very substantial preponderance in the testimony as recorded." Various lower courts, following *Universal* and *Allentown* have indicated that the Examiner's findings are not necessarily to be taken as determinative, "for the record on review may well create doubts with respect to the truthfulness of a witness so powerful that they outweigh any evaluation based upon demeanor." *NLRB* v. *Jackson Maintenance Corporation*, 283 F.2d 569 (2d Cir. 1960). See also *Utica Observer-Dispatch* v. *NLRB*, 229 F.2d 575 (2d Cir. 1956). In short, in the instant case, there is unmistakably clear and convincing evidence which, in any event, would have outweighed a favorable evaluation based upon demeanor. See also note 3, *supra*, and *Carbon Emery Broadcasting Co.*, 22 FCC 584, 586, 12 RR 1268, 1268c (1957), stating that "Where the facts are otherwise clear and reliance upon demeanor is not essential to the decision, the Commission feels that the demeanor factor should be employed with considerable restraint, if at all."

[9] We note, in passing, that Intervenors' exceptions totaling 121 pages, their brief totaling 67 pages, and their Appendix A setting forth a chronology of dates and a summary statement of the significance of those dates, do not, contrary to their assertions, provide either a complete and accurate statement or an analysis of the evidence.

[10] See *Prattville Broadcasting Co.*, *supra*, 5 FCC 2d at 604, where the Board stated, among other matters, that: "The weight to be given to the facts and circumstances admitted as well as the inferences reasonably drawn therefrom, is for the Board. *F.T.C.* v. *Pacific States Paper Ass'n.*, 273 U.S. 52 (1927). The possibility of drawing either of two inconsistent inferences from the evidence does not prevent the Board from drawing one of them. *NLRB* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105 (1942). As stated by the court in *Radio Officers' Union* v. *NLRB*, 347 U.S. 17 (1954): An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions *as reasonably may be based upon the facts proven*. 347 U.S. at 48–49." (Emphasis supplied.) (Footnote omitted.)

We also call attention to the fact that in *Radio Officers' Union*, *supra*, a rebuttable presumption was invoked concerning the reasonably foreseeable consequences of conduct. However, in the instant case, it is unnecessary to speak of presumptions with respect to Intervenors' conduct; there is evidence of specific knowledge and intent.

minutely reviewing the record which Intervenors' counsel, at the oral argument, described as a "horrendous" task, the Board is not unmindful of the theories pressed upon it by counsel in an attempted demonstration that this is a "picayune case," and that it should be decided on the basis of law, and equitable considerations. These theories are predicated upon essentially the same legal arguments previously presented in Intervenors' 60-page pleading entitled "Comments to Petition to Enlarge Issues" which we rejected—after a lengthy discussion—in our Memorandum Opinion and Order, released approximately five years ago on December 6, 1968, adding the strike issue, and specifically naming Intervenors as "parties" to the strike issue. 15 FCC 2d 400, 14 RR 2d 1000. Subsequently, on January 22, 1969, Intervenors, at their request,[11] were permitted expanded participation with respect to the other issues in this proceeding. Despite the fact that no appeal [12] to the Commission from our Memorandum Opinion and Order adding the strike issue was taken by the Intervenors, now after full participation in a protracted hearing where they have denied the strike charges and come forward with, at best, unreasonable and illogical explanations of their conduct, they ask us to ignore the proven facts and circumstances, and to decide this case on the same rejected and erroneous legal theories.

9. In our view, and with utmost respect for Intervenors' counsel who made the foregoing suggestion, this approach would be manifestly indefensible. In this connection, it is to be noted that Intervenors admit that the instigation and assistance in the preparation of an application by an existing licensee or by its agent for the purpose of blocking additional competition to that licensee which would result from another already *pending* application, would constitute strike conduct. Nevertheless, they insist that when such a pending application is "returned" as not acceptable for filing, the "return" has the same force and effect—as a matter of law—as an application which is "dismissed" by the Commission or "withdrawn" voluntarily by the applicant. In short, they contend that—as a matter of law—a pending application is the *sine qua non* of the Commission's strike policy, irrespective of the Commission's Rules which prescribe a different effect when an application is merely returned, as compared with one that is dismissed or withdrawn. Thus, when the Commission's Rules with

[11] Intervenors' Petition for Expanded Participation, in part, reads as follows: ". . . the issues in this formerly simple 307(b) proceeding were substantially modified to add a 'strike' issue requested by Cullman . . . and petitioners were specifically named parties to it. . . . [P]etitioners sought strenuously to avoid participation by arguing that the 'strike' issue . . . should not be added . . . . If nothing else . . . [the strike issue] has a substantial and adverse impact on petitioners, since *it requires them to defend themselves and their past conduct in this very proceeding.*" (Emphasis supplied.)

[12] We, of course, do not fault the Intervenors for not filing an application for review because Section 1.115 governing the filing of such applications by subsection (e)(2) encourages such application to be delayed until the filing of exceptions. However, the NOTE following subsection (e)(2) reads, as follows: *"Unless the ruling complained of is fundamental and affects the conduct of the entire proceeding,* requests for review should be deferred until the time when exceptions are filed." (Emphasis supplied.) Obviously, if Intervenors' legal theories had been accepted by the Commission—on review in 1968—by a reversal of our Memorandum Opinion and Order adding the strike issue, the conduct of this entire proceeding would have been fundamentally affected. Thus, we note in passing that Intervenors could have sought Commission review in 1968 to test their legal theories. However, the fact that they chose not to do so does not justify the equities which they now seek stemming from passage of the protracted time—five years—which has been involved in trying this strike issue.

respect to a "returned" application [13] are applied to Intervenors' theory, it is utterly without foundation. Indeed, even applying the literal meaning [14] of these words to Intervenors' premise, there is no foundation for it. Thus, contrary to Intervenors' contention that a "returned" application does not have the status of a "pre-existing" application which may be resubmitted by the applicant, the Commission's Rules make it so. Nor is there any merit to Intervenors' position (see footnote 12, Intervenors' Brief) that if a returned application is deemed to be a pre-existing one this accords "special protection to non-applicants *vis-a-vis* actual applicants." Section 1.571(c) of the Commission's Rules relating to application processing procedures applies alike to pre-existing applicants—non-applicants—and actual applicants by establishing a cut-off date, and prescribing the last day for non-applicants to file new applications and for pre-existing applicants to resubmit or refile their application. In short, the Commission's Rules are fashioned to accord the greatest opportunity to all applicants to compete for facilities on the basis of orderly and fair procedures which are non-discriminatory despite the implications of Intervenors' position here. See also Intervenors' own experience with their Huntsville application, paras. 39–42, *infra.*

10. Moreover, as will be shown by our supplemental findings of fact, Intervenors' misconduct commenced prior to the return of the Cullman 1540 kHz application—when it was pending before the Commission. In June 1965, Millar threatened [15] Mitchell with the filing of an economic protest which, according to Millar, would result in costs to each of them of $20,000, and would delay action on the Cullman application for several years. (See paras. 52 to 53, *infra.*) At this time, Millar, the extraordinarily experienced broadcaster, knew on the basis of his own prior experience of the difficulties in making the required threshold showing of public interest detriments; he also knew from his own prior experience that the Commission does not protect existing licensees from private competition; however, he did not reveal these

[13] Section 1.564(a) of the Commission's Rules provides, in part, that "Applications which are not substantially complete will be returned to the applicant." Section 1.1102(i) reads, in part, as follows: ". . . all application filing fees will be charged irrespective of the Commission's disposition of the application. ***Applications returned to applicants for additional information or corrections will not require an additional fee when resubmitted, unless the additional information results in a major change in the application;*** the resubmission will then be treated as a new application requiring a new filing fee." (Emphasis supplied.) It may be noted that Section 1.1102(i) was, in substance, derived from former Section 1.1103(d) of the Commission's Rules which became effective, originally, on March 17, 1964.

[14] Although the words dismissal, withdrawal, and return are generally well-understood words, with manifestly different meanings, Intervenors and their counsel have deliberately avoided their differences. According to Webster's New World Dictionary, College Edition (1960), "dismiss" means "to discontinue or reject;" "withdraw" means ". . . retire or retreat . . .;" and "return" merely means ". . . to turn away from . . . ." In short, there is nothing definitive or dispositive about the word "return."

[15] Although we do not, and need not, reach the question of whether Millar's conduct constituted "harassment", it is pertinent to point out the Board's holding in *Chronicle Broadcasting Co.*, 19 FCC 2d 240, 244 (1969), where we stated: "Harassment occurs, in our view, not only when a witness or party is directly threatened with reprisal for his involvement in a Commission proceeding, see *Sioux Empire*, 9 FCC 2d 850, 11 RR 2d 112 (1967); but also conduct, including unnecessary, unreasonable, and abusive investigation, bringing social and economic pressures to bear upon the witness and reasonably and seriously calculated to dissuade the witness from continuing his involvement in a proceeding, constitutes harassment as fully as a direct threat of reprisal. Thus, there are limits to the permissible scope of an investigation of adversaries; carried too far, the investigation becomes a method of harassment and attempted intimidation."

Stated another way, "Good faith and fair dealing bear upon the public interest." *Granik* v. *FCC*, 98 U.S. App. D.C. 247, 249, 234 F.2d 682, 684 (1956).

salient facts to the novice Mitchell. In September 1965—approximately two months prior to the return of the Cullman application—Bullard contacted two persons who—three months later in December 1965, immediately following the return of the Cullman application—became Sumiton's initial investors. The record reveals that at this time in September 1965, Bullard, at the least, was stimulating the interest of these investors in a Sumiton station.

11. Although it cannot be said that these isolated overt acts, standing alone, which occurred prior to the return of the Cullman application, would constitute strike conduct, nevertheless, when considered with Intervenors' overt acts of instigating and aiding in the preparation of the Sumiton 1540 kHz application after the return of the Cullman application, there is a chain of events which require collective consideration in a determination of the strike issue here. As stated by the Commission in *The Walmac Co.*, 36 FCC 507, 508 (1964):

> Isolating and evaluating each of the items in this fashion obscures and distorts the overall picture. Nowhere does the examiner consider altogether the collective effect . . . and . . . explanations thereof, upon . . . conduct as a broadcast licensee.

Moreover, even if we disregarded Intervenors' overt acts which occurred prior to the return of the Cullman application, and decided this case solely on the facts, circumstances and events which occurred after the return of the Cullman application, Intervenors are guilty of strike conduct. As will be shown by our detailed substituted or supplemental findings of fact, *infra*, after the return of the Cullman application, they instigated the completion of the Sumiton company and the Sumiton application; they also participated substantially in the preparation of that application. Standing alone, it is the Board's view that these overt acts establish strike conduct, without regard to the other antecedent events.

12. Thus, it is clear that irrespective of (a) whether the facts and circumstances in this case relating to Intervenors' overt acts after the return of the Cullman application are considered separately, or (b) whether they are considered collectively with events which occurred prior to the return of the Cullman application, Intervenors are guilty of strike conduct. Stated another way, irrespective of how these adverse facts and circumstances are considered and weighed, Intervenors' truncated legal theories could not be followed without (a) defeating the Commission's strike policy; (b) insulating Intervenors from their misconduct; and (c) reaching a decision which would be inconsistent with the whole scheme of the Communications Act favoring free competition in the broadcasting field, as well as with the Supreme Court's holding in the *Sanders Bros.* case, 309 U.S. 470, 475 (1940) that "Plainly it is not the purpose of the Act to protect a licensee against [private] competition . . . ." Suffice it to say without engaging in a discourse of the genesis and origin of the Commission's strike policy and of the Commission's case law on the subject,[16] that this case presents only questions relating to the facts and circumstances underlying

[16] For an able discussion of both the history of the policy and case law, see Brief for the Commission at 30–37, *Pressley* v. *FCC*, 141 U.S. App. D.C. 283, 437 F.2d 716 (1970). See also the opinion of the Court in *Pressley*, *id.* at 287–88, 437 F.2d at 720–21.

the strike issue; there are no questions of law relating to the applicability of the Commission's strike policy to the facts and circumstances revealed by this record.

13. Thus, we agree fully with the late Judge's ultimate conclusion that Intervenors were intent in blocking the Cullman application, although we are, perforce, required to make substituted or comprehensive supplemental findings of fact, and to substitute our conclusions for those of the Initial Decision. To the extent that the findings of fact of the Initial Decision are not inconsistent with our substituted or supplemental findings, they are adopted. Our ruling on Intervenors' exceptions are set forth in the Appendix attached hereto. Without regard to the sharp testimonial conflicts (paras. 3 and 4, *supra*), we have concluded on the basis (a) of the other facts and circumstances surrounding Intervenors' overt acts; (b) of Intervenors' extraordinary experience and background in the radio field encompassing personal experience with an economic protest, with a mutually exclusive application requiring a comparative hearing, with an application which was returned by the Commission as defective and which was resubmitted by Intervenors, with Bullard's demonstrated sophisticated abilities in making preliminary "thumb nail" frequency studies of potentially available frequencies; (c) of their denials of the strike charges; (d) of their failure to follow the advice of their legal counsel; and (e) of the unreasonableness and unreliability of their explanations with respect to their conduct, that this record contains an abundance of evidence that they, knowingly, engaged in a path of conduct designed not only to dissuade Mitchell from further prosecuting the Cullman application prior to its return, but, in addition, to block a resubmitted Cullman 1540 kHz application if Mitchell could not be otherwise induced to abandon the resubmission of such an application.

14. We further conclude that the version of the testimonial conflicts of evidence set forth in paras. 3 and 4, *supra*, which supports and corroborates our adverse independent conclusion must be accepted, and that the conflicts are, therefore, resolved on the basis of Mitchell's and Sims' testimony and on the basis of the facts set forth in the engineer's memorandum. We also conclude that when these corroborative facts are considered together with those which led to our independent conclusion, the totality of this record establishes not only an abundance of evidence, it establishes unmistakably clear and convincing evidence—beyond doubt—of Intervenors' pattern of misconduct. In addition, we conclude that (a) Intervenors' path of conduct has been bizarre and circuitous, and cannot be said to have the ingredient of guilelessness consistent with their asserted innocence; (b) their protestations of innocence are also inconsistent with their inherent denial that they had no knowledge or cause to suspect—as a matter of common sense and of *fact*—that they were not engaged in a pattern of strike conduct; (c) their protestations of innocence are, accordingly, incredulous on their face; and (d) their explanations of their conduct are afterthoughts in an attempt to justify their misconduct. Finally, in light of the foregoing, we have concluded that when Intervenors' explanations of their conduct are viewed on the basis of the totality

of the evidence including the corroborative facts, set forth in paras. 3 and 4, *supra*, their explanations are not only afterthoughts, they are lacking in candor and constitute a pattern of deceit.[17] See also para. 139, *infra*.

15. With respect to Sumiton, and on the basis of our *de novo* reading of the record and our substituted or supplemental findings of fact, we disagree with the Judge's ultimate conclusion that Sumiton had no knowledge[18] of Intervenors' strike activities. As shown by paras. 89–90, 97–98, and 106, *infra*, Chapman and Ballenger, who were Sumiton's initial investors, not only knew of Intervenors' behind-the-scene activities as creators of their application despite their respective denials, they participated and/or cooperated in these activities. We have also concluded at paras. 131–134, *infra*, that Intervenors, either directly or indirectly, paid the engineer for his services in connection with the preparation of the Sumiton application, which is corroborated by Sims' testimony (see para. 3(b) indicating that Miller told him that his engineer would take care of the engineering). At paras. 108–109 and 118–122, *infra*, it has also been shown they further collaborated in the payment of a fee to Bullard which, as a matter of fact, constituted a payment for advertising charges and not for his services in connection with the preparation of the Sumiton application. In short, there is ample evidence of Ballenger's and Chapman's collaboration with Bullard, and their close cooperation, from which a sound conclusion can be reached that they could not have been so closely associated with Bullard, in Intervenors' path of deliberate strike conduct, without knowing that the details related to the realization of their common goals.

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[17] *Grenco, Inc.*, 39 FCC 2d 732, 736–37 (1973), reads, in pertinent part, as follows: "Next we shall consider: (a) whether in the disposition of this case we may take into account any false swearing . . . at the hearing in the absence of a character issue. . . .

"On issue (a) above, the Courts and the Commission have consistently held that false statements in response to Commission inquiries and in the course of the hearing process are, in and of themselves, of substantial significance. See *Nick J. Chaconas*, 28 FCC 2d 231, 233 (1971). Complete candor from Commission licensees as to matters under investigation may be demanded and is expected. *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946). While issues are designated to place the licensee on notice of the charges which he will be required to meet at the hearing, notice to a[n] . . . applicant that he must testify truthfully . . . is superfluous. Taking an oath serves that purpose and no unfairness results in holding a[n] . . . applicant to have knowingly assumed the risk of an adverse determination as to its character qualifications when a principal testifies falsely at the hearing.

* * * * * * *

". . . We stress that our holding is based on the particular facts of this case, and does not represent in any way a retreat from the important policy of *WOKO* that we cannot temporize with deliberate deception of the Commission. No matter how unblemished the reputation of the principal in the community, no one is allowed 'one bite' at the apple of deceit."

See also *Capitol Broadcasting Co.*, 29 FCC 677, 682 (1960), where it is stated that "In the instant case, the circumstances surrounding . . . [the] filing are aggravated by . . . lack of candor as a witness in the instant proceedings." *Cf. The Walmac Co., supra*.

[18] In reaching our adverse conclusion, the Board is mindful of the fact that no exceptions have been directed to the Judge's favorable conclusion. However, an analysis of the Initial Decision demonstrates that the Judge, following the Bureau's deficient proposed findings, did not consider the denials of knowledge by Sumiton's two initial investors, in light of all of the other evidence in this proceeding which establishes that their respective denials strain credulity beyond its limits. Moreover, as pointed out in paras. 106–107, *infra*, there is nothing inconsistent with our conclusion here that Chapman and Ballenger had knowledge of Intervenors' activities and participated in them, and Sims' testimony (para. 3(b)) that he did not tell Ballenger and Chapman of Intervenors' activities because of their admonishment to him to keep their activities secret. The short answer is that on the basis of our conclusion Chapman and Ballenger knew of Intervenors' activities prior to Sims' entry on the scene on December 4, 1965. Sims did not have to tell them.

16. In sum, although there is no question that Sumiton's principals desired to construct this proposed Sumiton station at the time the application was filed, the Commission's standard established as long ago as 1960 in *Capitol*, *supra*, and followed by the Board in *Blue Ridge Mountain Broadcasting Co., Inc.*,[19] 37 FCC 791 (1964), requires a denial of the Sumiton application. In *Blue Ridge*, *id.* at 800–801, the Board stated that:

> The test formerly applied under the "strike" issue was whether the applicant intended to construct and operate a station. *Johnston Broadcasting Co.*, 3 R.R. 1784 (1947); *Grand Haven Broadcasting Company*, 6 R.R. 452 (1950); *Louisiana Broadcasting Company*, 4 R.R. 441 (1948). Once this intent was shown, no additional showing was necessary to establish good faith filing. However, the Commission has more recently held that irrespective of a finding of intent to construct, an application can be denied where there exists an improper motive in the filing of the application, such as a desire to impede, obstruct, or delay grant of another application. *Capitol Broadcasting Co.*, 29 FCC 677, 20 R.R. 979 (1960), reconsideration denied 30 FCC 1, 20 R.R. 1011 (1961). Under this inquiry, the applicant must assume the burden of proving that his application has been filed for a proper purpose.

17. Accordingly, the Sumiton application must be denied on the basis of the strike issue in this proceeding, standing alone, and without regard to the other disqualifying issues. We therefore need not as a matter of law reach the other disqualifying forged affidavit and Section 1.65 issues. (See para. 2(d), *supra*.) We do so solely for the purpose of aiding other reviewing authorities should they disagree with our analysis and adverse views relating to Sumiton on the strike issue. Accordingly, we conclude now that we would not disqualify the Sumiton principals on the forged affidavit or Section 1.65 issues, standing alone, for reasons which are set forth in our rulings on Sumiton's exceptions in the Appendix attached hereto. Nevertheless, when the facts relating to Ballenger's gross carelessness and cavalier disregard for proprieties with respect to the so-called forged affidavit are considered in the context of our findings and conclusions relating to the strike issue, there is a pattern of conduct established by Ballenger and Chapman which falls far short of that required to be a broadcast licensee. In this connection, we are mindful of the fact that Ballenger has withdrawn from the company. However, Chapman remains, and the unreasonableness of his explanations with respect to the strike issue has been found to strain credulity beyond its limits. To the extent that the findings of fact of the Initial Decision are not inconsistent with our conclusions herein on the so-called forged affidavit issue, they are adopted. We do not adopt the disqualifying conclusions of the Initial Decision on this issue, standing alone, for reasons already detailed above.

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[19] Review denied by the Commission, Jan. 6, 1965 (FCC 65–5), affirmed *per curiam sub nom. Gordon County Broadcasting Co.* v. *F.C.C.*, No. 19,165 (D.C. Cir. Sept. 14, 1965), 6 R.R. 2d 2044.

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18. The remainder of this Decision will be divided into the following subparts:

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C. Intervenors' extraordinary experience, knowledge, and background in the radio field:	
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FURTHER IDENTITY OF THE PRINCIPAL WITNESSES AND THEIR INTERRELATIONSHIPS

19. Preliminarily, it is to be noted that although Intervenors were permitted expanded participation in this proceeding [20] on the basis of their allegation that they were required "to defend themselves and their past conduct in this very proceeding", Intervenors limited their direct case, by their own choice, to the testimony of John P. Bankson, Jr., their Washington communications counsel. Likewise, their rebuttal showing [21] is an extremely limited one. Hence it is significant to note

[20] See note 11, *supra*.

[21] See note 4, *supra*. By their exceptions and brief, Intervenors claim that adverse rulings of the Presiding Judge prejudiced their rebuttal showing and their efforts to establish purported bias and prejudice of Mitchell, Murphree and Sims. However, the record demonstrates that the Judge did allow Intervenors' counsel latitude in his cross-examination of these witnesses, but ultimately refused to permit the continuance of this remote and uncertain inquiry. In the Board's view, the Judge also, rightly, refused to issue subpoenas to compel testimony from two other individuals. For the history of these matters, see the Board's Memorandum Opinion and Order, released May 28, 1969, denying appeals by Millar and Bullard from the Judge's rulings denying requests for discovery and oral depositions, and dismissing their alternative request to enlarge issues to inquire into the motives behind the refiling of Cullman's application, 18 FCC 2d 78. Briefly, Intervenors' motion for discovery was filed January 10, 1969, and was denied by the Presiding Judge on February 7. On February 11, Intervenors filed a notice of taking depositions, which was quashed by the Presiding Judge on March 7. In the meantime, on February 20, Intervenors filed a petition for reconsideration and motion for stay of the Judge's February 7, 1969 Order which was denied by Order of the Presiding Judge on February 28. A request for

that after the dismissal of the Cullman application the Bureau assumed the burden of proceeding with the evidence, and Mitchell, Sims, Murphree, Ballenger, Millar and Bullard appeared voluntarily as Bureau witnesses. With the exception of Millar and Bullard, they were not represented by personal counsel. And due to this unusual—if not advantageous [22]—procedure, Intervenors were cross-examined by their own counsel. Principal witnesses on the strike issue appearing on behalf of Sumiton were: Chapman and the engineer (para. 4), who was also Millar's engineer during the period of the controversy here. Again, Intervenors' counsel was accorded the privilege of cross-examining virtually his own witness. (Tr. 1223.) Surely, considering this unique procedure in this case governing the presentation of witnesses, it may reasonably be said that the Presiding Judge and the Bureau did, in fact, "bend over backwards" to insure an extraordinarily fair and judicious treatment of the Intervenors.[23]

20. In light of this unusual procedure relating to the presentation of witnesses, it is significant to note that the testimony of Mitchell and Sims preceded that of Millar and Bullard, and that when Millar appeared to testify, the transcript at page 719, reads, as follows:

> Mr. KRAUS. I would like the record to show, Mr. Examiner, that he is appearing voluntarily, not by subpoena.
>
> Presiding JUDGE. The record will so note, yes. Let the record also note that Mr. Millar has been in attendance virtually the entire proceeding. Is that right, Mr. Millar?
>
> Mr. MILLAR. Yes, sir.
>
> Presiding JUDGE. So he is generally familiar with the testimony of the other witnesses.

21. There follows a brief description of each of the principal witnesses with respect to the strike issue in the order of their appearance at the hearing. *Dan Cole Mitchell*, Cullman, Alabama. 50% owner, partner and proposed General Manager of the now-dismissed Cullman applicant. He is 46% owner of Mitchell Motors, Inc. of Cullman, Alabama. He has known Leon Murphree, the other partner, since 1955 when the latter sold advertising on WFMH, Cullman. Mitchell has also

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stay of the February 7 Order, filed March 7, was denied by Order of the Review Board, released March 14. Intervenors' appeal from the February 28 Order, filed March 7, and their appeal from the March 7, 1969 Order quashing notice to take oral depositions, were denied by the Board's May 28, 1969 Memorandum Opinion and Order, *supra*. On September 25, 1969, the Commission denied Intervenors' application for review of the Board's May 28 ruling, which was filed June 19, 1969 (after the Commission granted Intervenors' request for a two-week extension of time). The hearing commenced on December 8, 1969, in Birmingham, Alabama. Adequate accommodations for a hearing were unavailable in Sumiton.

[22] For a discussion of Order of Proof in General, variations thereof, in the discretion of the Trial Judge, and the inherent advantages of cross-examination, see 3 Jones, Evidence Sections 809–812, 816, 824–827 (4th ed. 1938). For example, at Section 826, it is stated that "While the party who produces a witness vouches for his credibility, the cross examiner sustains no such relation to the witness." Likewise, it is also stated that "If he is a party, the witness may be cross examined as to discrepancies between his statements on the stand and the allegations of his pleadings . . . ." In the instant case, there are affidavits of Millar and Bullard attached to their Comments to the Petition to Enlarge Issues which resulted in the addition of the strike issue.

[23] *Cf.* Intervenors' Brief, at page 3, para. 2, where it is stated, among other matters that "[o]ne would expect . . . that the Broadcast Bureau would bend over backwards to insure a fair and judicious evaluation of this seemingly endless case." Compare also Intervenors' proposed findings at page 4, para. 6, where they comment adversely on the Bureau's stated intention, after the Cullman application was dismissed, to litigate, vigorously, the strike issue, despite the fact that this is properly the role of the Bureau. Apparently, it is the thrust of Intervenors' position that the Bureau and the Commission should have no interest in their misconduct as principals and/or agents of a broadcast licensee.

advertised on WKUL since the late 1950's, and Millar considers him one of WKUL's largest advertisers. Mitchell has been active in boy scout work, both locally and nationally. He has worked with the Rotary Club, the United Fund and various other civic organizations in Cullman. (Tr. 288.)

22. *Thomas Wayne Sims*, Jasper, Alabama. At the time of the hearing, Sims was the advertising director of Top Dollar Stores, Inc., a retail chain which advertises on WARF, there. From March 1957 to November 1964, Sims was employed by WARF and performed at various times, such duties as program director, manager, chief engineer and salesman. He worked for a short period of time at WKUL in the late 1950's. Sims has, therefore, known both Millar and Bullard. During this period, Millar owned WARF, and Bullard was General Manager and a salesman. Sims has also known Chapman "for 7 or 8 years" and plays poker with him. He did not know Ballenger prior to the return of the Cullman application. Since November 1964, Sims has performed a few engineering tasks for WARF, Jasper, and WWWB, Jasper, without charge, and has also done some "color" broadcasts for both stations at local high school sports events.

23. *Cecil Freeman Ballenger*, Sumiton, Alabama. Formerly a 25% stockholder, Vice President and Director of the Sumiton applicant who withdrew from the corporation by amendment dated December 3, 1969, after a dispute as to whether he "forged" the signature of John Logan Fowler, another stockholder, to an affidavit. His business interests are: 50% owner of B & F Lumber Co. in Sumiton (the other 50% was owned by John Logan Fowler, who subsequently sold his interest to Ballenger after this dispute concerning the "forged" signature); 25% stockholder and President of Sumiton Gas Company; and 4% stockholder and Director of The Sumiton Bank (which has agreed to loan money to the applicant). Ballenger has been an advertiser on WARF, Jasper, which was owned by Millar for the period 1958–1965, and has known Bullard, who served as General Manager of WARF until it was sold in 1965, and who sold him advertising. Prior to the hearing in this proceeding, he had not met Millar. During this period, Ballenger did not know Sims. He did know Dr. Chapman (described *infra* at para. 26) as a patient. (Tr. 1051.)

24. *Hudson C. Millar, Jr.*, Fort Pierce, Florida, one of the Intervenors. Currently, President and Director of Airmedia, Inc., and 50.81% stockholder of Class A stock and 94.3% stockholder of Class B stock of that corporation since January 1966. Airmedia, Inc. is the holding company for Cullman Broadcasting Co., Inc., now licensee of WKUL, of which Millar is a Director and former 100% owner. (1951–1966.) Airmedia, Inc. also wholly owns Indian River Broadcasting Co., the licensee of WIRA and WOVV–FM, Fort Pierce, Florida, of which Millar has been the President, Director and General Manager since September 16, 1967. Millar was the 100% owner of Station WARF, Jasper, from 1956 to June 1965, when it was sold to Radio South, Inc. He is now a director on the Board of the Florida Broadcasters. (Tr. 1313.) Millar knew Mitchell, Murphree, and Sims. He was acquainted with Chapman (described *infra*); he did not meet Ballenger until the hearing in this proceeding.

25. *James Jerdan Bullard*, Cullman, Alabama, the other Intervenor herein. Currently, President, Director and General Manager of Cullman Broadcasting Co., Inc., licensee of Station WKUL, Cullman, since November 1966. Cullman Broadcasting Co., Inc. is wholly owned by Airmedia, Inc., of which Bullard is Vice President and Director, and a 9.04% Class A stockholder and 5.7% Class B stockholder. From August 1958 to June 1965, Bullard was General Manager of and a salesman for WARF, Jasper, and Vice President and Director of the corporate licensee of WARF, in which Millar owned 100% of the stock. As indicated previously, WARF was sold to Radio South, Inc., effective June 1, 1965. Bullard has worked for Hudson Millar since graduation from the University of Alabama in August 1958. Bullard has had an extensive background in radio, having majored in this field and having graduated in 1958 as the outstanding student of the Department of Radio and Television. During his college days he also held positions as announcer and salesman at various commercial stations, as well as noncommercial educational stations. Bullard had a longtime relationship with Sims, Ballenger, and Chapman.

26. *Jerry Curtice Chapman*, Jasper, Alabama (currently residing in Roswell, New Mexico). Formerly a 25% stockholder, and now a 33⅓% stockholder, Vice-President, Treasurer and Director of the Sumiton applicant. Dr. Chapman is a practicing chiropractor and owns his own clinic in Jasper. Dr. Chapman and his wife own 50% of La Petite Beauty Salon, Inc. in Jasper. Bullard sold him radio advertising, during the time chiropractors were allowed to advertise. Bullard has also been a patient of Dr. Chapman since 1965; they have known each other since 1959. He has also known Sims socially, as a member of a poker-playing group, for 7 or 8 years. Chapman knew Ballenger as a patient; he was acquainted with Millar.

27. *John P. Bankson, Jr.*, Washington, D.C. Communications Counsel for Airmedia, Inc., and its wholly owned subsidiary licensees, including WKUL, Cullman, and for Millar.

28. *Julius Cohen*, Washington, D.C. Consulting Engineer for Millar and for the Sumiton applicant.

THE LOCATION OF THE CITIES OF CULLMAN, JASPER, AND SUMITON, ALA.; THEIR RESPECTIVE POPULATIONS, AND BROADCAST FACILITIES; THE PROXIMITY OF BIRMINGHAM, ALA.[24]

29. Briefly, the approximate distance separations (between city limits) may be described as follows:

Sumiton to Jasper—10 miles.
Sumiton to Birmingham—16 miles.
Sumiton to Cullman—28 miles.
Cullman to Jasper—30 miles.[25]
Cullman to Birmingham—36 miles.
Jasper to Birmingham—28 miles.

[24] Although substantial portions of the data are spread throughout the record, the Board has taken official notice of the facts detailed here for purposes of obviating the need for precise record citations. All distances are approximate ones, between city limits. All population data are based on the 1970 U.S. Census.

[25] Official notice has been taken of information in *Standard Rate and Data* for the period 1958–65, which indicates that a joint advertising rate was offered for WKUL–WARF as the Alabama Ace Network, during the period Millar owned both stations.

30. Cullman (pop. 12,701 persons) is situated in Cullman County, with a population of 52,445 persons. Jasper (pop. 10,798 persons) and Sumiton (pop. 2,374 persons) are both situated in Walker County which has a population of 56,246 persons.

31. Radio stations located in Cullman are: WKUL (Intervenors' station), which operates on 1340 kHz, 1 kw-Day, 250 w-Night; WFMH, 1460 kHz, 5 kw-Day, 500 w-Night, DA-N, and its commonly-owned FM station WFMH–FM; and WKLN (FM), WKUL is the oldest station in Cullman, having commenced its operation in 1946; it has no associated FM station. WKLN (FM) commenced operation in 1968, having been granted its application for a construction permit on March 23, 1967. WFMH commenced operation in 1950, after difficulties stemming from an economic protest filed by WKUL directed against the establishment of Cullman's second station.

32. There are three broadcast stations in Jasper. WARF (owned by Millar until June 1965) operates on 1240 kHz, 1 kw-Day, 250 w-Night; WWWB (owned by the Bankhead family), operates on 1360 kHz, 1 kw-Day, and its associated FM station WWWB–FM. Of the two AM stations, WWWB commenced operation first in 1946, followed by WARF in 1957, after Millar received a grant of an application for construction permit without hearing. Subsequently, in 1961, WARF was authorized to change its daytime power from 250 watts to 1 kw.

33. There are no broadcast stations located in Sumiton. Although the record does not establish the number of radio reception services in Sumiton which is only 10 miles from Jasper, and approximately 16 miles from Birmingham, it does establish that during Millar's ownership of WARF, Bullard, as his General Manager, solicited advertising in Sumiton.

INTERVENORS' EXTRAORDINARY EXPERIENCE, KNOWLEDGE, AND BACKGROUND IN THE RADIO FIELD

34. *The 1949 WKUL Economic Protest:* In his testimony, Millar related skeletal facts concerning his acquisition of WKUL, Cullman, in 1949, and the then-pending economic protest filed by the former owners directed against the establishment of a second radio station in Cullman. He stated that in 1949 when he acquired his initial part-interest in WKUL, he succeeded to the rights of the former owner with respect to this economic protest. The sense of his testimony is that he dropped, complacently, an appeal to the court because the second station was on the air, both stations were doing well, and the "cost" would be very high. (Tr. 745–46.)

35. Accordingly, the Board cannot escape the more detailed facts concerning the Commission's views denying this 1949–50 economic protest because of the failure of WKUL to make the required threshold showing of public interest detriments, as distinguished from private economic injury. The first Commission opinion denying rehearing, *The Voice of Cullman*, 14 FCC 770, 775–76, released March 27, 1950, reads, in pertinent part, as follows:

> . . . The public interest strongly favors competition in the broadcast industry. The whole scheme of regulation embodied in the Communications Act of 1934 is based upon the proposition that the governmental policies appropriate to the

areas of free competition rather than those applicable in the public utility and common carrier fields will achieve the most satisfactory utilization of our available broadcast spectrum.[26] This was explicitly recognized by the Court in the *Sanders Bros.* case. In particular, the Court said at 309 U.S. 475: "Plainly it is not the purpose of the [A]ct to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."

Petitioner attempts to circumvent the recognized purpose of the [A]ct by equating private with public interest. It argues that the establishment of another broadcast station in Cullman will cause WKUL's program service to deteriorate and thus the public interest will suffer. But this obviously does not follow since the public will be enjoying not only petitioner's service but a new service. What the public may lose at one point it will gain at another. . . .

* * * * * * *

We are forced to conclude from a careful consideration of the pleadings in this proceeding that despite protestations to the contrary, petitioner is seeking a hearing for the purpose of showing that it is entitled to be protected against competition; this claim runs squarely against the Supreme Court's holding in the *Sanders Bros*, case. . . . It is the judgment of Congress that the competition between stations to survive furnishes the best incentive to render the best possible service.

* * * * * * *

. . . With these considerations in mind, the Commission has determined that, as a matter of policy, the possible effects of competition will be disregarded in passing upon applications for new broadcast stations. We here reaffirm that determination.

36. The Board also cannot escape official notice of the fact that on April 6, 1950, WKUL filed a petition for interim relief, requesting that the Commission maintain the status quo of the grant of the construction permit to the applicant for the then second Cullman station, pending determination of the appeal taken to the Court by petitioner on April 6, 1950. Thus, there is a second Commission opinion, *The Voice of Cullman*, 14 FCC 1076, released May 16, 1950, denying the petition. Footnote 2, *id.* at 1077, of that opinion reads, as follows:

It is therefore unnecessary to determine the significance, with respect to a claim of irreparable injury of the partial protection against loss from competition which petitioner enjoys by reason of the contractual provision referred to by The Voice of Cullman. It is likewise unnecessary at this time to consider the propriety of such a contract. In granting its consent to the assignment of the WKUL license the Commission implicit[l]y approved the particular contract referred to. Upon reconsideration in the light of developments in this case, the Commission is of the opinion that there is a substantial question whether such contracts are in the public interest. Contracts having similar provisions will in the future receive careful scrutiny.

37. On the basis of the foregoing exposition of the Commission's views in *The Voice of Cullman*, *supra*, it may reasonably be said that Millar, by his own personal experience, knew and was well aware (a) of the difficulties of making the required threshold showing of public interest detriments in an economic protest, and (b) of the fact that the Communications Act encourages private economic competition between broadcasters, and accords existing stations no protection, *per se*, from such private competition.

[26] Compare the Board's conclusions in the instant case at para. 12, *supra*, relating to Intervenors' truncated legal theories.

38. *WARF, Jasper*: Millar also testified in skeletal fashion with respect to his ownership of WARF, commencing in 1958 and continuing to June 1965, when the station was sold. As indicated previously, Millar received the WARF authorization by the grant of an application for construction permit, without hearing.

39. *Intervenors' Resubmitted and Conflicting Huntsville, Alabama Application:* Again, in skeletal manner, Millar's testimony includes some information concerning Intervenors' Huntsville application, which was ultimately dismissed after payment of their out-of-pocket expenses by the other parties. (Tr. 731.) And, again, the Board cannot escape official notice of the more detailed facts as shown by the Commission's official records and the face of the Commission's Memorandum Opinion and Order, *Fine Music, Inc.* (*WFMI*), 6 FCC 2d 186, designating the Huntsville application for consolidated hearing with other conflicting applications. These facts are: On May 10, 1965 (almost contemporaneously with the filing in this proceeding of the original Cullman 1540 kHz application) Intervenors tendered for filing the application of Rocket City Broadcasting Company, Inc., for a new station in Huntsville, Alabama, on the frequency of 1000 kHz. Millar was to be president, a director and 55% stockholder of the corporate applicant; Bullard, the proposed vice president, a director and 30% stockholder. As shown by the Commission's Memorandum Opinion and Order, *supra*, Rocket City was the last-filed in a chain of applications involving respective prohibitive overlap: two proposals for stations at Blountstown and Quincy, Florida, two in Huntsville, and one in Montgomery, Alabama. The lead cut-off date for all these applications was that of Quincy, Florida.

40. As further shown by the Commission's Memorandum Opinion and Order, *supra*, on June 16, 1965, the Commission returned the Rocket City application as untimely, the application having been filed substantially after the lead cut-off date. Thereafter, Rocket City *resubmitted* that application on July 16, 1965, along with a petition for review of the Commission's prior action returning the application. In the petition, Rocket City argued that its operation did not involve prohibitive overlap with the Florida proposals, but rather was mutually exclusive with the Huntsville, Alabama proposals. On December 15, 1966, the Commission designated three of these five applications for hearing, waived the provisions of the cut-off rule and accepted for filing Rocket City's application, *nunc pro tunc*, as of May 10, 1965. The Commission's Memorandum Opinion and Order, *id.* at 187, in pertinent part, reads, as follows:

> 3. We do not find, on the basis of these facts, that Rocket City is entitled, as a matter of right, to acceptance and consideration of its application with the Tennessee Valley and Fine Music proposals. Notwithstanding any subsequent developments, the fact remains that, on the date of its original tender, Rocket City failed to include evidence [adequate measurements] sufficient to warrant a conclusion that there was no conflict between the Florida and Fine Music applications. For that reason, the Rocket City application was properly found to be unacceptable for filing.
>
> 4. Although Rocket City's subsequent submission (on July 16, 1965) of adequate measurement data and our separate consolidation of the Florida applications do not alter Rocket City's rights in this matter, they do argue forcefully for

a waiver of the cutoff rule and nunc pro tunc acceptance of its application. When Rocket City first tendered its application, the best available data on file indicated that the Florida and Fine Music proposals involved an engineering conflict necessitating a hearing and that, by virtue of this conflict, the cutoff date of the Quincy proposal precluded acceptance of Rocket City's application. The absence of this conflict, however, is no longer subject to dispute since the Fine Music, Inc., amendment of June 13, 1966, and, therefore, we are persuaded to waive the cutoff rule on our own motion and to accept the application for filing.

41. Intervenors' Huntsville application was ultimately dismissed with prejudice by the Board's Order of August 30, 1967 granting a joint request for approval of agreement to reimburse Rocket City to the extent of $20,000. 9 FCC 2d 849.

42. On the basis of the foregoing history of Intervenors' Huntsville application, it can reasonably be said that Millar and Bullard, by their own experience, knew that it is an applicant's absolute right (a) to request a specific frequency and to choose the frequency so specified and requested in its application; and (b) to resubmit an application which has been returned because it is deemed deficient without payment of an additional filing fee unless there have been major changes made in the application, like a change of frequency. (See para. 9 and note 13, *supra.*) They also knew, on the basis of their own personal experience with the Huntsville application, that the return of an application by the Commission does not *ipso facto* mean that the applicant either has abandoned the application or the frequency specified. Indeed, they knew from personal experience that even where an application may not appear to meet the Commission's rules and is returned for that reason, such an application may be resubmitted with appropriate explanations and proof to show that the application does meet the rules. In addition, they knew from their Huntsville experience that conflicting applications require long and protracted hearings. In short, it can further be reasonably said that they knew—as a matter of fact—that the return of the Cullman application (a) accorded them no greater rights as principals or agents of WKUL than existed prior to its return, and (b) accorded them no liberties as principals or agents of WKUL to engage in their own machinations with respect to the 1540 kHz frequency in order to block its use in Cullman.[27]

43. *Hudson Millar and Associates:* Millar and Bullard also engaged in broadcast consulting under this firm name. (Tr. 993.) The firm was more or less dormant until the sale of WARF, Jasper, in June 1965. Prior to June 1965, Bullard had never received any income from this

[27] Millar's testimony, in pertinent part, reads, as follows:

Presiding JUDGE. . . . My problem is, you have indicated that after the application was returned you had no idea what they were going to do. Haven't you testified to that?

Mr. MILLAR. Yes, sir, that is right.

Presiding JUDGE. I said, *logically,* you would assume they are going to be [re]filed, wouldn't you?

Mr. MILLAR. *Well, I think there are many applications filed and then withdrawn.*

Presiding JUDGE. That is not the question. Under the circumstances prevailing here, wasn't it logical for you to assume that they would refile? You said, "Well, yes, but I thought they would refile under a different frequency", at least that is what I thought you said.

Mr. KRAUS. Same objection, Mr. Examiner.

Presiding JUDGE. Haven't you said that?

Mr. MILLAR. No, that was only said in light that if they did anything that is what I thought they would do.

Presiding JUDGE. Enough of this. Go ahead, Mr. Tacy.

(Tr. 766–67; emphasis supplied.) See para. 9 and notes 13 and 14, *supra,* with respect to the underscored portion of Millar's testimony.

firm. (Tr. 994.) Millar had received approximately $400 from one client. (Tr. 993.) However, the firm was reactivated purportedly on or about the time they instigated and aided in the preparation of the Sumiton application. (Tr. 994–95, 1304.) As broadcast consultants with at least 15 years of experience, it can reasonably be said that they knew, as a matter of commonly known and recognized facts in this industry, that one of the Commission's primary allocation objectives is the establishment of a first transmission facility in every community, and that an application for a community which has no station is, generally, preferred over conflicting applications for communities which have one or more such facilities. It can also reasonably be said that they knew that where there are conflicting applications, each applicant has a right to a hearing. Hence, it can further be reasonably said that after the return of the Cullman application, they knew that if a Sumiton 1540 kHz application could be filed prior to the time the Cullman 1540 kHz application was resubmitted, an earlier filed Sumiton application would serve natural—if not tactical—purposes. First, it could discourage the refiling of the Cullman application because long and protracted hearings naturally have a discouraging effect. Secondly, in the event Mitchell and Murphree were not so easily discouraged, an earlier filed Sumiton 1540 kHz application would result practically and tactically in a *fait accompli*, causing naturally a hindering and blockage of a subsequent resubmitted Cullman application.

44. *Airmedia, Inc.:* Shortly after the sale of WARF, Jasper, in June 1965, Intervenors began planning the organization of a new corporation to be known as Airmedia, Inc., where the public would own some of the stock. Their plans looked toward acquisition of WKUL, Cullman, by this yet-to-be formed new company, and ultimately additional radio stations. Bullard remained with WARF, Jasper, to accommodate the new owners for the month of July 1965, and after returning from a vacation about the middle of August, he devoted for the next two months approximately one-third of his time to the investigation of markets which were in need of additional and new stations. Airmedia, Inc. was incorporated in the State of Delaware on November 3, 1965, prior to the return of the Cullman application. On December 23, 1965, an application (BTC–4995) for transfer of control of the licensee of WKUL to Airmedia, Inc. was filed with the Commission, and on January 13, 1966, the Commission approved this transfer, effective January 17, 1966. When interrogated at the hearing, Millar did not know Bullard's initial stock interest in Airmedia. (Tr. 725.) Bullard's testimony is likewise unrevealing except that he did testify that he purchased stock in December 1965 and in January 1966 and that he was one of the originators, one of the promoters, and one of the original stockholders. (Tr. 813.) Subsequently, Bullard also became General Manager of WKUL, Cullman.

45. *Bullard's Clock Advertising Business:* Bullard owned several clocks on which he could place advertising. This business was in a dormant stage until August 1965, when Bullard returned from his vacation and commenced devoting a substantial portion of his time to Airmedia. However, Bullard's clock advertising business, like Intervenors' broadcast consultant business, was reactivated in August–Sep-

tember 1965; it is the basis of the bizarre arrangement effected by Bullard which purportedly constituted Sumiton's payment to him for his services in aiding in the preparation of the Sumiton application. See paras. 31 and 32 of the findings of fact of the Initial Decision, which the Board adopts as a fair and accurate recitation of the evidence that Bullard, in actuality, was paid only the nominal sum of $9.00 for his services. See also paras. 118 to 122, *infra.*

46. *Bullard's Sophisticated Knowledge and Ability in Making "Thumb-Nail" Sketches Showing Potential Frequency Availability:* Indubitably, Bullard's knowledge and ability in making preliminary frequency checks are more than one would normally expect of a broadcaster who is not an engineer. For example, during the period August–September 1965, he devoted approximately one-third of his time to studying markets which needed new and additional radio stations for the yet-to-be formed Airmedia company. On the basis of the Board's expertise, such studies relating to markets which need new and additional radio service inherently involve the ability, at least, to make preliminary estimates of potential frequency availabilities; otherwise, considering the commonly known saturation of the radio spectrum, there would be no purpose in making such studies. The record also shows that he made a "thumb-nail" sketch of potential frequencies for Cullman, at a time when he and Millar were considering the feasibility of improving the facilities of WKUL, in order to combat the additional competition from the then-pending 1540 kHz Cullman application. It also shows that when he, admittedly, determined the potential availability of the 1540 kHz frequency for Sumiton, he was able to do so by looking at a map. (Tr. 768.) It also indicates that he did a study of its potential availability for use in Birmingham by looking at a map. (Tr. 768.) Subsequently, he also prepared a so-called frequency breakdown which revealed to him that "1540 kHz was the best frequency" for Sumiton. (Tr. 836.) In short, this record demonstrates Bullard's extraordinary engineering skills.

47. *Millar's and Bullard's Knowledge of the Commission's Strike Policy:* The record reveals specifically that (a) there was no discussion between Millar and Bankson about the stimulation by Intervenors of the filing of another application which would block the 1540 kHz application (Tr. 759); (b) Millar, admittedly, was personally aware of the Commission's strike policy (Tr. 758); and (c) Bullard also knew that principals or agents of an existing broadcast station should "never . . . obstruct", and testified that he would not touch an application which conflicted with the Cullman 1540 kHz application when it was "on file" . . . "with a 10 ft. pole." (Int. Exh. 2.) Unequivocally, Bullard also testified that he was not "instrumental" either in the Sumiton proposal or "preparation of the application." (Int. Exh. 2.) Since some of Intervenors' overt acts occurred both prior to and after the return of the Cullman application, the record can best be examined on the basis of two categories, *viz.*, the facts and circumstances, including Intervenors', Ballenger's and Chapman's explanations of their conduct (a) between the dates of May 26, 1965 (the date the 1540 kHz Cullman application was tendered for filing) and November 24, 1965, the date of the Public Notice (Report No. 7672) when the Commission

announced the return of the Cullman application, and (b) between November 24, 1965 and April 3, 1966 when the Cullman 1540 kHz application was resubmitted, during which time the Sumiton application was tendered for filing on January 24, 1965.

FACTS AND CIRCUMSTANCES BETWEEN MAY 26, 1965, AND NOVEMBER 24, 1965, RELATING TO INTERVENORS' OVERT ACTS; INTERVENORS', BALLENGER'S AND CHAPMAN'S RESPECTIVE EXPLANATIONS OF THEIR CONDUCT

48. *May 26, 1965:* The application of Mitchell and Murphree, d/b as Cullman Music Broadcasting Company, was *received* at the Commission on May 26, 1965. At this time, the Cullman applicant was not represented either by local counsel or by a Washington communications lawyer. The engineering portion was prepared by Dwight Cleveland, an out-of-town engineering consultant. In other respects, the application had been prepared by Murphree in Cullman, and apparently was mailed to the Commission. It contained a number of letters from residents of Cullman endorsing the proposal for a new and additional station in Cullman.

49. On this same date, Bankson notified Millar of the receipt of the Cullman application by the Commission although there is no explanation in the record as to how Bankson knew of this fact. However, it is apparent that Millar must have advised Bankson previously of the imminence of the filing of the Cullman application and asked him to check the Commission filings. For it is evident that on the basis of the Commission processing procedures and of the fact that the Commission's Public Notice announcing the filing of the Cullman application was not issued until a subsequent date, Bankson would not, in the ordinary course of business, have known of this filing on May 26, 1965, unless he had been forewarned by Millar to check Commission filings.

50. *The Unreliability of Millar's Explanations:* For the reasons set forth above, the Board rejects Millar's testimony and Intervenors' proposed finding which reads, as follows: "Mr. Millar first heard of the filing of Cullman Music's application during a phone conversation with Mr. Bankson which occurred on or about May 26, 1965." See footnote 2, page 10, of Intervenors' proposed findings. We also reject that portion of para. 40 of Intervenors' proposed findings which reads, as follows: ". . . the record is devoid of any evidence that anybody connected with WKUL knew about *Cullman Music's plans* prior to the time the application was first filed with the Commission in 1965. . . ." (Emphasis supplied.) For it is clear that since the Cullman application included letters of endorsement from potential advertisers, from a local probate judge, and from a local government official, as well as from other area residents, Cullman's plans to file an application were not secret ones in the community. Indeed, it may be reasonably said that where potential local advertisers and area residents, particularly in a community the size of Cullman know of plans for a new and additional station, word of this travels quickly, so to speak, as local community "gossip". Thus, it may also be reasonably said that owners of existing stations, who naturally either, personally, or through their employees, deal with (a) local advertisers, and (b) community leaders,

also become aware of this, so to speak, local gossip. Accordingly, Millar's protestations that he had no knowledge of the imminence of the filing of the Cullman application are deemed unreasonable and illogical, if not lacking in candor.[28]

51. *June 1, 1965:* The Commission's Public Notice (Report No. 7546) issued June 1, 1965 announcing that the Cullman 1540 kHz application was tendered for filing, has been officially noticed by the Board. At page 3 thereof, the Cullman 1540 kHz application is listed as tendered for filing, together with three other applications for different frequencies and different communities. Of the four applications, two are listed as new applications, and two as *resubmitted* applications. Hence, this record establishes that applications which are returned because they are deemed to be deficient can be and, indeed, in the Board's expertise, frequently are resubmitted to the Commission as provided for by Section 1.1102(i) of the Rules. See also paras. 39–41, *supra*, relating to Intervenors' own resubmission of their own Huntsville application on July 16, 1965.

52. *Early June 1965:* Local notice of the filing of the Cullman application appeared in the Cullman newspaper in early June. At that time, Millar called Mitchell and requested that they meet to discuss some business. There is extensive testimony concerning this conference which took place on the same day that Millar initiated it. Significantly, there are no factual conflicts of importance between Millar's and Mitchell's recollection of this meeting, except the dispute as to Mitchell's interpretation of the discussion as a "threat" by Millar to file an economic protest, with its ensuing high costs and delay. (See para. 3(a), *supra.*) There is no dispute that Millar (a) advised Mitchell that Cullman was too small to support an additional station; (b) offered to sell WKUL, Cullman, to him; (c) offered to sell him stock in Airmedia, when it was organized; (d) asserted that he and his lawyer had decided to file an economic protest; and (e) advised him of the resulting high costs and delays. In Millar's own words:

> I laid my cards on the table and told him my rights under the rules and regulations. (Tr. 756.)
>
> * * * * * * *
>
> . . . Dan is a very astute businessman. He likes to lay the facts on the table, doesn't like for you to go beating around the bush. He was one of my large advertisers and I didn't want him to hear it from anybody else. . . . (Tr. 743.)

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[28] Millar's testimony is also inherently inconsistent in this respect with his other testimony in the record. He also testified that in December 1965, when Bullard was assisting the "Sumiton group" in the preparation of the Sumiton application, his assistance to Sumiton was "generally known in the area." (Tr. 780.) However, Millar neither explained, nor is it apparent, why Bullard's assistance to Sumiton was a matter of common knowledge in the area, and Cullman's plan to file was not. For it is clear, on the basis of this record, that Sumiton made only the briefest type of community ascertainment survey in its original submission, and that, in this respect, the Commission's designation Order, 13 FCC 2d 221, 222, reads, as follows: ". . . Sumiton stated . . . that it was relying on (i) the residence of its four stockholders in the county; (ii) the working experience of one of the stockholders in a county radio station; and (iii) a survey of 12 community leaders in Sumiton whose "ideas of needs to be served in local programming are reflected in the proposed program schedule." * * * In the case at hand, Sumiton has failed to identify the 12 community leaders, has failed to enumerate their suggestions, and has failed to give an evaluation of the suggestions received. Basically, all we have in the way of a survey is a *naked averment that 12 people were contacted*, followed by the unsupported assertion that the program schedule reflects "[t]heir ideas of needs to be served." Obviously, this survey does not approach the type of thorough search and careful analysis expected of applicants for new stations." (Emphasis supplied.)

Suffice it to say that if, under the circumstances depicted above, Bullard's assistance in December 1965 to Sumiton was common knowledge in the area, Cullman's plans to file in May 1965 may likewise be deemed to be of common knowledge.

There is also no dispute that Mitchell was not interested in Millar's alternate propositions. Given the personal experience of Millar with an economic protest (paras. 34–37, *supra*), the record, however, is devoid of evidence that Millar, so to speak, in laying the cards on the table advised Mitchell, the novice, and one of his largest advertisers, that the Commission accords no protection to existing stations from private competition, and that it is a difficult task to make the required threshold showing of public interest detriment in order to obtain a hearing on an economic protest.

53. *The Unreliability of Millar's Explanations:* The Board rejects that portion of para. 20 of Intervenors' proposed findings that during this Mitchell-Millar meeting Millar "revealed that he had talked to Mr. Bankson about the *possibility* of bringing an economic injury protest. . . ." (Emphasis supplied.) First, Millar did not speak merely in terms of a "possible" economic protest when he talked with Mitchell. By his own testimony, he told Mitchell "I had discussed with my lawyer an economic injury case . . . [which] would cost both of us in the neighborhood of $20,000 . . . and that it could take from two to three years. . . ." (Tr. 743.) Secondly, in contrast to the implications of Millar's testimony relating to his conversation with Bankson concerning an economic protest and to the apparent definiteness that an economic protest would be filed, Bankson, in his testimony, could not recall any discussions with Millar concerning economic protests until after the Cullman application was resubmitted in April 1966. (Tr. 1214–15.) In fact, when interrogated by Commission counsel as to what advice he gave Millar during this May 26, 1965 conversation, Bankson relied on a letter, dated June 30, 1965, written to Millar, apparently in response to a prior Millar letter advising of defects in the Cullman application. See para. 55, *infra*. By this June 30th letter, Bankson advised Millar that "it was too early to do anything about it [the Cullman application]. The application had a lot of problems and defects to be cleared up. The cut off date would be sometime in the future. I was not encouraging them to do anything at the time." (Tr. 1214.) Moreover, Bankson testified that no evaluation was made by him concerning an economic protest until after the Cullman application was resubmitted in April 1966. (Tr. 1215.) And the fact remains that no economic protest was ever filed in this proceeding. Accordingly, the Board rejects as unreasonable, Millar's testimony that, at the least, indicates that prior to the Mitchell meeting in early June 1965, he and Bankson had decided to file an economic protest. In light of Millar's failure to advise Mitchell that he might have difficulty in making the required threshold showing for an economic protest, the Board also concludes that Millar did threaten Mitchell, as a matter of fact.

54. Shortly after the Mitchell-Millar meeting, Millar, in accordance with his request to Bankson, received a copy of the Cullman application. He then personally called on three of the persons who had endorsed the Cullman application. See para. 16 of the findings of fact of the Initial Decision which the Board adopts as a fair and accurate evaluation of the evidence.

55. In early June 1965, Millar also reviewed the Cullman application. Subsequently, he advised Bankson of what he deemed to be the

defects in the Cullman application. These purported defects are adequately and fairly described at para. 14 of the findings of fact of the Initial Decision, and will not be repeated here.

56. At or about this same time in early June 1965, Millar and Bullard discussed the possibility of improving the facilities of WKUL, if there was going to be another station in Cullman. It is at this time that Bullard made, so to speak, a "thumb-nail" frequency check for Cullman, and he decided that there were some frequency potentials. In Bullard's words, "it was my opinion that there was more than this one frequency which could be used in Cullman . . . if there was going to be another station in Cullman. . . ." (Tr. 817–18.) Millar then contacted Julius Cohen, his Washington engineering consultant.

57. *June 18, 1965:* Cohen's study indicated that 910, 950, 1090, 1520 and 1540 kHz might be available for use in Cullman. However, it is to be noted that Cohen did not make a detailed engineering study to determine definitively whether these frequencies could be used non-directionally, although he "believed" that one frequency had this potential, namely, 1090 kHz. (Tr. 764–65, 818–19, 821–22, 1228–29.) Accordingly, this record is devoid of substantial evidence that an alternative frequency which could be used non-directionally, daytime, was, in fact, available for Cullman. At most, there is a suggestion of the potential availability of another frequency. Cohen's study further did not include any information concerning the possible nighttime use of these potential frequencies. After Intervenors studied the Cohen report, they decided not to improve the facilities of WKUL because of "the value of full time service and nighttime service that it provides. . . ." (Tr. 817–22.) Millar testified that he was interested in a regional frequency with 10 to 50 kw power, unlimited time. (Tr. 764.)

58. At or about this same time, Intervenors received their Huntsville application which had been returned to them on June 15, 1965. See paras. 39 to 42, supra.

59. *June 30, 1965:* Bankson wrote Millar and informed him that it was too early to do anything about opposing the Cullman Music application.

60. *July 16, 1965:* As shown by paras. 39–42, *supra*, Intervenors resubmitted their Huntsville application, along with a petition for review of the Commission's prior action returning that application. See also notes 13 and 14, *supra*.

61. *August–September 1965:* As indicated previously in the discussion concerning Airmedia, Bullard returned from a vacation about the middle of August, and he thereafter devoted for the next two months approximately one-third of his time to studies of markets which needed new and additional radio stations, inherently involving the ability to make estimates concerning the potential availability of frequencies. (See paras. 44 and 46, *supra.*) At that time, Bullard also had the Cullman potential frequency availability report of Cohen. Accordingly, at this juncture, it is to be noted that despite all of Bullard's demonstrated know-how (para. 46, *supra*), and the fact that the distance separation between Cullman and Sumiton is only 28 miles, the Board is, nevertheless, asked to believe that in August 1965 when Bullard was studying new markets for Airmedia, he did not, consistent

with human experience, if not human curiosity, consider the potential use of the 1540 kHz frequency in Sumiton or Birmingham, even though it is clear that on the basis of Bullard's own understanding of the Commission's strike policy, (para. 47, *supra*) he knew that if they attempted to use the frequency for themselves in either of these two communities at that time (August–September 1965), such an application would fly in the face of the Commission's strike policy. Without equivocation, Bullard testified that such a potential use never crossed his mind until the return of the Cullman application in November 1965. (Tr. 821.)

62. Although Bankson's testimony does not contradict Bullard's disclaimer of knowledge or suspicion that the 1540 kHz frequency would fit in Sumiton or Birmingham, Bankson did testify that it is during this period of the organization of Airmedia that Millar discussed with him the potential of Birmingham as a market for Airmedia. Bankson's testimony, in pertinent respect, under cross-examination by Mr. Tacy, the Bureau's counsel, reads, as follows:

> Q. You have not had an opportunity to read the transcript?
> A. I read certain portions of Mr. Millar's testimony and Mr. Bullard's testimony.
> Q. Do you recall during these discussions . . . with Mr. Millar about participating in the filing of an application for Birmingham on that [1540 kHz] frequency?
> A. *I recall discussing with Mr. Millar during this period the possibility of filing for Birmingham and perhaps a dozen other communities. This was when they were organizing a holding company for a public offering.*[29] It was also after a rather extended freeze had been lifted. . . . I don't recall specifically discussing the use of 1540 in Birmingham with Mr. Millar. (Emphasis supplied.) (Tr. 1210–1211.)

63. Bankson also testified that he had no recollection of Millar discussing with him the possibility of Intervenors applying for a station in Sumiton. In Bankson's words: "Mr. Millar never asked me that. I don't think that he would because I think he would have felt precluded from filing. I don't recall specifically discussing it." (Tr. 1210.) In light of Bankson's testimony, the Board cannot escape officially noticing the contract of sale of WARF, Jasper, which contains a covenant not to compete, reading as follows:

> Seller agrees for a period of five (5) years after the closing date it would not engage directly or indirectly in the ownership or operation of any radio station in Walker County, Alabama.

See application for assignment of license of WARF, filed April 1, 1965, granted by the Commission on May 17, 1965, effective June 1,

[29] In light of the *underscored* portion of Bankson's testimony which specifically pins the time of his discussion with Millar concerning Birmingham to the period of the organization of Airmedia, it is evident that this discussion took place prior to the return of the Cullman application. Airmedia was incorporated on November 3, 1965. The Cullman application was returned by a Commission letter dated November 18, 1965. Yet, Intervenors in para. 49, footnote 9, of their proposed findings distort Bankson's testimony in this respect, and attempt to relate his testimony to a period after the return of the Cullman application in an effort to have Bankson corroborate their testimony that they did not consider the Birmingham market and the use of the 1540 kHz frequency there until after the Cullman application was returned. The clear import of Intervenors' footnote 9 in this respect is that after the return of the Cullman application, "Bankson recalls that Mr. Millar discussed the possibility of using the frequency himself in the Birmingham area (Tr. 1211)". The record is devoid of such testimony by Bankson, and in addition Intervenors' citation for the proposition it advances is the transcript page of Bankson's testimony quoted above.

1965. As previously indicated, Millar was 100% owner of the stock of the corporate licensee of WARF, and President and Treasurer, and Bullard was Vice President and a director of the corporate licensee, and General Manager and a salesman of WARF until it was sold in May 1965. Sumiton with its population of 2,374 persons, is situated in Walker County, 10 miles from Jasper which is also located in Walker County, and approximately 16 miles from Birmingham, which is located in a different county.

64. *The Unreliability of Bullard's Explanation that the use of the frequency in Sumiton and Birmingham did not cross his mind in August–September 1965:* On the basis of the facts and circumstances detailed above, the Board concludes that Bullard's explanation is inherently improbable.

65. In sum, the record establishes that in August–September 1965, Intervenors either knew or had reason to suspect that the 1540 kHz frequency could be used in Birmingham or Sumiton. The record also establishes that by this time Millar had reached an impasse with Mitchell concerning either the sale of WKUL, or his purchase of stock in Airmedia, when it was formed, in lieu of continuing with the prosecution of the Cullman application. Millar had also reached an impasse with respect to the possibility of improving WKUL's facilities with a regional frequency utilizing 10 to 50 kw power. He also knew, on the basis of his personal experience, that the required threshold showing for an economic protest was a difficult one, and that absent such a showing it is the Commission's policy to encourage—not discourage—private economic competition of broadcasters. He also knew that Commission policy accords existing stations no protection, *per se*, from private economic competition. On the basis of their personal experience, Intervenors also knew that a conflicting application, particularly one for a community without a radio station like Sumiton, would result practically and tactically in a *fait accompli*, naturally causing a hindering and blockage of the then-pending Cullman 1540 kHz application. They also knew on the basis of their own understanding of the Commission's strike policy (para. 47, *supra*), that an application for themselves for 1540 kHz in Birmingham or Sumiton would, boldly, fly in the face of the Commission's strike policy. In addition, they knew that the WARF covenant not to compete (para. 63, *supra*) caused problems with their entry into Sumiton. Significantly, they did not pursue this bold path prior to the return of the Cullman application, even though they were looking for new markets for Airmedia, and discussed the Birmingham market with Bankson. Indeed, in response to a question from Bureau counsel as to whether prior to the return of the Cullman application in November 1965, they had taken other steps to prevent a grant of Cullman's application, Millar responded:

> Well, Mr. Tacy, we know the rules of the Commission, although we disagree with some of them, but we try hard to abide by every rule to the best of our ability. *And we knew it was unlawful for us to take any steps other than the ones we took.* (Tr. 758.) (Emphasis supplied.)

66. *The Unreliability of Millar's Statement that they took no other steps:* Despite Millar's testimony that "we knew it was unlawful for

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us to take any steps other than the ones we took," in September 1965, Bullard contacted Ballenger [30] and Chapman [31] who three months later became Sumiton's original investors [32] in the subject application for a station in Sumiton to be operated on the 1540 kHz frequency. Although Bullard's, Ballenger's, and Chapman's testimony is a maze of contradictions as to whether, during this critical period prior to return of the Cullman application, these discussions centered on Sumiton, specifically, or on their mutual interest in radio station investments, generally, the Board finds on the basis of the totality of the *admitted* facts that during this period the Bullard-Ballenger discussions and the Bullard-Chapman discussions focused on the establishment of a radio station, in the Alabama area, generally, if not Sumiton, specifically. Briefly, their testimony and the conflicts as to the substance of their discussions is set forth in the margin below.[33]

67. Moreover, the Board finds, on the basis of Millar's and Bullard's testimony that during September 1965, Bullard, with the knowledge of Millar, was, at the least, stimulating Ballenger's and Chapman's interest in a Sumiton station. Bullard not only told Millar of the interest of Ballenger and Chapman in a Sumiton station, he also told Sims at a "perchance meeting" in October 1965, that Chapman was considering him in connection with a Sumiton radio station. Thus, irrespective of the conflicts concerning the Chapman-Bullard discussions in September, there is no question that Bullard understood that these discussions centered on Sumiton.

68. *The Unreliability of Chapman's and Bullard's Explanations that the September 1965 discussions did not center on Sumiton:* On the basis of the facts and circumstances detailed above, as well as those which occurred after the return of the Cullman application described *infra*, the Board concludes that Bullard's retraction of his initial testimony that the discussions centered on Sumiton is unworthy of belief, and that for the same reasons, Chapman's unequivocal denial that the discussions were focused on Sumiton is, likewise, unworth of belief. For the record is clear that Chapman's testimony relating to the facts and circumstances of his conduct after the return of the Cullman application, is inherently inconsistent with his denial, as well as incon-

[30] As shown by para. 45, *supra*, at this time Bullard had also reactivated his clock advertising business, and Ballenger did purchase a one-year contract for clock advertisements on September 13, 1965.

[31] Chapman did not purchase Bullard's clock advertisements in September 1965. During September 1965, Bullard's contacts with Chapman were also as a patient, in a series of seven visits to Chapman on September 8, 9, 11, 15, 18, 21, and 25, 1965.

[32] As previously indicated, Ballenger was also a patient of Chapman's. Although Chapman testified that he and Ballenger prior to December 1965 discussed their mutual interest in entering the radio field, the record is devoid of evidence indicating that there were any Chapman-Ballenger meetings, coincidentally or otherwise, in September 1965; nor were there any discussions. However, as will be shown, *infra*, there were Chapman-Ballenger meetings on November 29, 1965, December 3, and December 7, 1965, shortly after the Intervenors received notification on November 26, 1965 of the return of the Cullman application.

[33] According to Bullard's initial testimony, his September 1965 discussions with Chapman centered on a Sumiton station, whereas Chapman's testimony contradicts Bullard's. Unequivocally, Chapman testified that in September 1965, he was interested in getting into broadcasting in the general area of Alabama, and that Sumiton was never mentioned in his discussions with Bullard. The thrust of Ballenger's testimony focused on his longtime desire to establish a station in Sumiton as far back as 1960 which was aborted by the Commission's freeze, and confirms Bullard's testimony. (Tr. 583–86, 823–24, 837.) Nevertheless, Bullard changed his testimony to comport with Chapman's. (Tr. 838.) Suffice it to say that the Board believes that these contradictions and modifications of testimony, under the circumstances of this case, present a bizarre situation.

sistent with human experience and normal business practices. Bullard's is incongruous. As will be shown *infra*, there is no question that these September 1965 discussions centered on a Sumiton station. See paras. 89–93, and 106, *infra*.

FACTS AND CIRCUMSTANCES AFTER THE RETURN OF THE CULLMAN APPLICATION RELATING TO INTERVENORS' OVER ACTIONS, AND INTERVENORS', CHAPMAN'S, AND BALLENGER'S RESPECTIVE EXPLANATIONS OF THEIR CONDUCT

69. Preliminarily, more specific details concerning the interrelationship (a) of Bullard with Ballenger and with Chapman; (b) of Ballenger and Chapman; and (c) of Sims with Millar, Bullard, and Chapman will best facilitate an understanding of the record and what occurred after the return of the Cullman application. The record establishes a longtime business relationship between Bullard and Ballenger, and a longtime social and business relationship between Chapman and Bullard.Thus, it is to be noted that despite Ballenger's testimony that he did not know in December 1965—after the return of the Cullman application—that Bullard was associated in any manner with Millar and/or WKUL, the circumstances of the Bullard-Ballenger interrelationship for a period of seven years, consistent with human experience and normal business practices, demonstrates that Ballenger's denial cannot be accepted at face value. It is undisputed that during the seven-year period (1958–June 1965) when Millar owned WARF, Bullard served as his general manager and as a salesman. Both Bullard and Ballenger testified that they had a longtime relationship stemming from the fact that Ballenger was an advertiser on WARF, and that Bullard, as general manager and a salesman, solicited Ballenger's advertising commencing in 1958 when Bullard first came to WARF. (Tr. 822–23.) Surely, consistent with human experience and normal business practices, longtime advertisers, particularly in small communities, know who owns the station over which they advertise. Moreover, it may reasonably be stated that Ballenger, as a longtime advertiser on WARF received bills and promotional letters from WARF, Jasper, in accordance with normal business practices commonly known and recognized in the radio industry.[34] Indeed, both Bullard and Ballenger testified that Bullard called upon Ballenger frequently (almost every week) to sell him radio advertising, that Ballenger advertised frequently, and that they *always* discussed Ballenger's interest in entering the radio business. (Tr. 590, 691–92.) As a matter of fact, Bullard described Ballenger as his "long friend" and "benefactor." (Tr. 843, 868.)

70. *The Unreliability of Ballenger's Testimony that he did not know of Bullard's nexus with Millar and WKUL:* For the reasons set forth

[34] The Board has officially noticed the letterhead stationery of WARF in the Commission's public license file. The masthead reads, as follows: "Walker County Broadcasting Company, Jasper, Alabama. . . . A Hudson Millar Station." The bottom printed line of the stationery reads, as follows: *"Affiliated with WKUL, Cullman, Alabama."* (Emphasis supplied.) See also note 25, *supra*, which indicates that a joint advertising rate was offered for WKUL–WARF as the Alabama Ace Network, during the period both stations were owned by Millar, and WARF was managed by Bullard.

above, the Board concludes that Ballenger's denial is unworthy of belief because it is inherently improbable.

71. Turning now to Chapman, admittedly he knew of Bullard's continued nexus with Millar, WKUL, Cullman, and Airmedia, after the sale of WARF in June 1965. He, too, was a former advertiser on WARF, Jasper, during the period chiropractors were permitted to advertise in Alabama. (Tr. 824.) Chapman's testimony with respect to his longtime relationship with Bullard, reads as follows:

> For several years prior to December, 1965, I discussed with Mr. Bullard my interest in acquiring an interest in a radio station in the general area of Alabama. These discussions took place during social affairs in Jasper over the years as well as on a trip with Mr. Bullard to a football game played at the University of Alabama in the fall of 1964. . . . (Sumiton Exh. 5, para. 4.)

72. Chapman also testified that Ballenger had been a patient since the early 1960's, and that they discussed from time to time their mutual interest in acquiring a radio station.

73. In contrast to the longtime relationships of Bullard, Chapman, and Ballenger, it is to be noted that Ballenger did not even know Sims until the events transpired which are set forth below. It is also to be recalled that Sims worked with Bullard at WARF, Jasper, during the entire seven-year period when it was owned by Millar. He left his employment with WARF in November 1964—approximately six months prior to the sale of the station—and became advertising director of the Top Dollar Stores. The record establishes that his office was situated in Jasper.

74. Chapman testified that he met Sims in 1960, and that they were casual poker-playing friends. Without question, there were casual remarks exchanged between Chapman and Sims concerning Chapman's interest in acquiring a radio station. Chapman described his casual remarks, as follows:

> . . . I know one time he [Sims]won a fairly large pot and I said, "My you got you a bundle of money. Let's go in the radio business", or something like this. (Tr. 1057.)

75. Sims' testimony also corroborates Chapman's with respect to the casualness of their relationship, as well as their remarks.

76. *November 18, 1965:* By letter, dated November 18, 1965, the Cullman application was returned to the applicant as unacceptable for filing, and was physically received by Mitchell the latter part of November 1965. The Board has officially noticed the Commission's letter. It is stated in the letter that the application was returned because the proposal for a Class II facility to operate on 1540 kHz failed to comply with Rule 73.187; that the frequency of 1540 kHz is a Class I frequency used by KXEL, Waterloo, Iowa; that Cullman had proposed to operate during the "critical hours" with a power of 1 kw; that this power resulted in radiation in pertinent directions toward KXEL which exceeded permissible values determined under the provisions of Rule 73.187; and that, for this reason, the application was returned as unacceptable for filing. Contrary to the import of para. 31 of the Intervenors' proposed findings, the Cullman application was *not* returned because of engineering deficiencies caused by interference with a station at Moulton, Alabama.

77. *Wednesday, November 24, 1965:* By Public Notice (Report No. 7672), the Commission listed the return of the Cullman application. (Int. Exh. 4, page 2.) As officially noticed, November 24, 1965, was a Wednesday; the following day was Thanksgiving. According to Millar's testimony, Bankson notified Millar of the return of the Cullman application by a letter of November 24, 1965. (Tr. 785.)

78. *Friday,*[35] *November 26, 1965:* The letter, according to Millar, reached him on November 26, 1965. Bankson also testified that he called Millar on the 26th. (Tr. 785; Int. Exh. 4.) Under examination by the Commission counsel and by the Presiding Judge, Millar's testimony as to his version of his discussion with Bankson and his version of Bankson's advice reads, as follows:

Mr. TACY. Now, there came a time, did there not, when Mr. Bankson, or someone in his firm, informed you that the Cullman Music Company's application had been returned, is that correct?

Mr. MILLAR. Yes, sir.

Mr. TACY. And about when did you first learn of that?

Mr. MILLAR. I think it was on November 26th, sir.

Mr. TACY. November 26, 1965?

Mr. MILLAR. Yes, sir.

Mr. TACY. Well, how did you find out about that, if you recall?

Mr. MILLAR. My counsel.

Mr. TACY. And did you inquire of your counsel whether it would be proper to file an application that might block the Cullman application?

Mr. MILLAR. *Sir, there was no application whatsoever involved at that time.*[36]

Mr. TACY. I will ask you the question now, did you have any confidential conversation with him about whether or not you could, at that point, legally do anything that would have the effect of blocking the Cullman application? Your answer was no?

Mr. KRAUS. Objection, Mr. Examiner. I don't understand the question?

Mr. TACY. All right, I withdraw the question.

Presiding EXAMINER. You withdraw the question, Mr. Tacy?

Mr. TACY. Yes, sir.

Mr. TACY. Did you have any discussion with your attorney as to whether or not, in view of the return of the Cullman application, you could proceed to either use that frequency yourself, or to have someone else apply for it? Did you ask him this question?

Mr. MILLAR. Yes, sir, I most certainly did.

Presiding EXAMINER. When was this? This was after——

Mr. TACY. During the conversation on or about the 26th of——

Presiding EXAMINER. With relationship to when the application was returned?

Mr. TACY. Yes.

Presiding EXAMINER. Was it after that?

Mr. MILLAR. Yes, sir, it was after that.

Presiding EXAMINER. After you found out they returned the application?

Mr. MILLAR. That is right, sir.

Presiding EXAMINER. The Commission returned it, then you went to Bankson and you did, in fact, have a conversation with him about what you could legally do?

Mr. MILLAR. Yes, sir, I did.

Presiding EXAMINER. To block?

Mr. MILLAR. Not to block, no, sir.

Presiding EXAMINER. Not to block. To what?

Mr. MILLAR. *To use the frequency myself or to give assistance to anybody else that wanted to use the frequency.*

Presiding EXAMINER. To give assistance to anyone else that wanted to use the frequency is, in effect, a try to block, isn't it?

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[35] As officially noticed.

[36] See paras. 9, and 39–42, *supra.*

Mr. KRAUS. Mr. Examiner——

Presiding EXAMINER. These words frighten you, words like block and so forth?

Mr. KRAUS. Yes, sir, they do because the record is going to be reviewed by other people, and as Mr. Tacy has said, this is the central issue in this case. And I think it is highly objectionable, under the circumstances where the application was returned and there was no application on file at all, to speak in terms of blocking something which didn't exist.

Presiding EXAMINER. Well, I don't know. The application was supposed to have been filed and returned. It is something that doesn't exist? I don't follow that at all.

Mr. KRAUS. As a matter of law, Mr. Examiner, that was not, at that time, an application pending before the Federal Communications Commission.

Mr. KRAUS. Now we are in a legal argument.

Presiding EXAMINER. Let me ask you, sir, you knew rather promptly when the application was returned, didn't you?

Mr. MILLAR. Yes, sir.

Presiding EXAMINER. Didn't you attempt to find out whether or not there—they were going to refile it?

Mr. MILLAR. No, sir, I did not.

Presiding EXAMINER. Didn't do anything about that?

Mr. MILLAR. No, sir.

Presiding EXAMINER. Did you think they would refile it? Didn't it seem logical that they would refile it?

Mr. MILLAR. I had no knowledge of what they would do, sir.

Presiding EXAMINER. I am asking you what your judgment was with respect to whether they would refile it, having gone to the expense of filing it once and having it returned, what did you think would happen?

Mr. MILLAR. I thought they would file on another frequency.

(Tr. 759–763; emphasis supplied.)

79. As previously pointed out, Bankson appeared as Intervenors' principal, if not sole witness. He testified several months after the Intervenors and indicated that he had read portions of Intervenors' prior testimony. Accordingly, it may be reasonably said that Bankson knew of Intervenors' version of his November 26th advice, as set forth above, and was in a position, unequivocally, to affirm or deny Millar's testimony. He did neither, even though privilege had been waived here. Nevertheless, construing Bankson's version in its most favorable light in support of Millar's testimony, the Board finds that Bankson's testimony, in substance, contradicts Millar's testimony that Bankson unequivocally advised him that after the return of the Cullman application, it would be lawful for them to use the frequency themselves or to assist others in the instigation of a 1540 kHz application. At most, Bankson unequivocally stated that:

> . . . in his opinion, the providing of assistance to a Sumiton group *solely* in the preparation of a 1540 kHz application would not provide a lawful basis for any adverse allegations against Mr. Millar or Mr. Bullard in the event any Cullman 1540 kHz application was filed at some future date. (Emphasis supplied.) (Int. Exh. 4, page 3, para. 10.)

80. We, accordingly, reject that portion of para. 49 of Intervenors' proposed findings that Bankson advised Millar that "*since there was no longer a Cullman Music application on file, it would be lawful for Mr. Millar to use the . . . frequency himself or assist somebody else*" in the instigation of an application, as unsupported by Bankson's testimony. (Emphasis supplied.) In this connection, it is to be noted that Intervenors' citation in support of this requested finding with respect to Bankson's testimony is to that portion of Bankson's testimony

quoted above [37] which, at most, relates to their assistance "solely" in the preparation of the application. The only other citation, *viz.* Tr. 771, is to Millar's testimony. In rejecting Intervenors' proposed finding, we are mindful of the fact that Bankson also stated that during this November 26th conversation, he advised Millar that there was no real likelihood that the Cullman application would be refiled because of the engineering problem which led to its return, as well as a purported interference problem with a Moulton, Alabama, station which Millar had previously advised him of in an early June 1965 letter. Bankson also testified that he "did some investigation of the situation" and satisfied himself that "there was no real likelihood of it" (the Cullman application being refiled). However, this record is devoid of any details concerning his investigation, and since the investigation, of necessity, entailed engineering research, the Board cannot give any weight to Bankson's bald statement relating to his own investigation of this engineering situation as of November 26, 1965 [38] confronting the Cullman application. Bankson is a lawyer, and this record is barren of evidence relating to his expertise in the engineering field.

81. In any event, Bankson's suppositious observations are irrelevant because he also unequivocally advised Intervenors that "there was no assurance that the Cullman 1540 kHz application would not be retendered, and that if it were, there was a possibility that allegations would be made against a Sumiton applicant if Mr. Millar and Mr. Bullard had assisted. . . ." He also advised them that "it would be preferable for them not to assist . . . because allegations of impropriety might be made regardless of their validity." (Int. Exh. 4, paras. 8 and 9, page 2.)

82. *The Unreliability of Millar's Version of Bankson's Advice:* The unreliability of Millar's version of Bankson's advice is not only demonstrated by Intervenors' inaccurate record citations in their proposed

[37] Contrary to the apparent impression of Intervenors proposed fact-finding is not a game. In addition, legal arguments concerning the state of the Commission's strike policy in 1965–66, cannot be deemed a substitute for the sworn statement of Bankson on this subject. As shown above, Bankson's testimony is devoid of any explanations as to what he believed Commission policy to be during this period, unlike the situation in the *Asheboro* case, 20 FCC 2d 1, 3, 17 RR 2d 647, 649–50 (1969), so strongly relied upon by Intervenors. As shown by para. 17 of the Initial Decision of former Judge Thomas H. Donahue, 20 FCC 2d 6, 15–16 (1968), adopted by the Commission in *Asheboro, supra,* counsel in that case testified, at length, and unequivocally stated what he understood Commission precedent to be in 1960, and he unequivocally stated, under oath, that he believed the critical consideration to be the presence of good faith intent to construct and operate if an authorization were granted. There is no such testimony by Bankson here as to Commission policy in 1965–66 when he advised Intervenors that they had, so to speak, a legal-go-ahead "solely" with respect to assistance in the preparation of an application. Moreover, it is significant to note that in 1960, the Commission issued its *Capitol* decision, *supra,* and the Board, in 1964, issued its *Blue Ridge* decision, *supra,* following *Capitol, supra,* which had changed pre-1960 policy, as shown by the excerpt from the *Blue Ridge* decision quoted at para. 16. It is to be further noted that Bankson testified in this proceeding on March 19, 1970, many months after the decision in *Asheboro, supra,* which was adopted by the Commission on October 15, 1969. Yet, Bankson's testimony here is barren of the same type of explanatory statements, under oath, as made by counsel in *Asheboro, supra,* and which were the basis of the Commission's decision that the legal-go-ahead from counsel "tilt[ed] the scales in favor of non-revocation," under those particular facts.

[38] It was not until approximately three and one-half years later that Intervenors filed a petition seeking a Section 73.37 issue against the then-resubmitted Cullman application based upon a detailed engineering report which raised a substantial question relating to possible interference by the resubmitted proposed 1540 kHz Cullman proposal to the Moulton, Alabama, station. See the Review Board's Memorandum Opinion and Order, released May 26, 1969, 18 FCC 2d 75, 16 RR 2d 408, adding a Section 73.37 issue against Cullman *with a provision for a waiver should any unusual facts so warrant.* However, this development is, at best, ancillary to the strike issue here and to an appraisal of Intervenors' conduct as of June 1965 through January 1966.

findings described at para. 80, above, it is also shown by the overt acts of Intervenors which followed the Bankson discussion. For it is clear, assuming *arguendo*, that Bankson did give *carte blanche* advice to Millar, it would be expected on the basis of Intervenors' good faith dealings with this Commission that if Intervenors had followed, blindly, such *carte blanche* advice and were subsequently charged with strike conduct, all facts would be admitted—not contested—and there would exist in a proceeding such as this, only the question as to the validity of their counsel's alleged *carte blanche* advice, and the equities, if any, which flowed to them from such erroneous advice. However, this is not the case here. Intervenors' good faith is not made manifest (a) by the innocence they have portrayed in blindly and openly following their counsel's alleged *carte blanche* advice, and (b) by the openness and candor with which they have admitted all of the facts concerning their conduct.

83. It is also clear that given such *carte blanche* advice, it would be expected, in accordance with normal business practices, that Intervenors who purportedly in August–September 1965 also reactivated their then-dormant broadcast consulting business, known as Hudson Millar and Associates (para. 43, *supra*), would have (a) initiated a meeting with their potential investors; and (b) met, openly, with them on the Sumiton proposal. However, they did not follow this path of innocence.

84. Instead, Intervenors' overt acts—after the return of the Cullman application and after obtaining their counsel's alleged *carte blanche* advice—establish that they developed a circuitous strategy, consistent with their personal knowledge that they—as a matter of fact—had no right to assume the Cullman 1540 kHz application would not be refiled (paras. 9, 39 to 41, *supra*) without taking the most elementary precaution of contacting the principals of the Cullman application to determine their intentions. Obviously, their circuitous strategy, demonstrated by their overt acts set forth below, was designed to insulate and protect themselves from:

(a) their own knowledge that if they, boldly applied for the use of the frequency for themselves in Birmingham or Sumiton, they would not only run afoul of the Commission's strike policy and the WARF covenant not to compete, they would also be displaying, boldly, their own deliberate path of misconduct in the event the Cullman application was resubmitted;

(b) their own counsel's admonishment that it would be lawful only to assist others "solely" in the preparation of an application; and

(c) their own bent to block the 1540 kHz Cullman application should it be resubmitted.

Stated another way, they knew, on the basis of their own knowledge and experience—and as a matter of fact—that their "bent" on a 1540 kHz Sumiton application was a path that knowledgeable broadcasters, like Intervenors, would not tread because of their own good faith and judgment, irrespective of the advice of counsel. In short, they knew that their plans were—as a matter of fact—a path of deliberate misconduct. Accordingly, we conclude that all of Intervenors' explana-

tions concerning their alternative considerations to the circuitous path they did follow in an effort to disguise their instigation of the "Sumiton group" and the Sumiton application, are mere afterthoughts in an attempt to distract attention (a) from their own path of deliberate misconduct, and (b) from the fact that they did not even follow their own counsel's purported advice in embarking on this determined course.[39]

85. *Sunday,*[40] *November 28, 1965; Intervenors' Selection of Sims as a Conduit:* Two days after Millar's conversation with Bankson, Millar decided to seek the assistance of Sims, his former longtime employee, in the completion of the organization of the "Sumiton group", and in the preparation of the Sumiton application. Purportedly, Intervenors chose Sims in order to do him a favor, since Millar knew of Sims' natural interest in acquiring an interest in a radio station. On the same day, Bullard also made a more definitive engineering study regarding the use of the 1540 kHz frequency in Sumiton.

86. *Monday,*[41] *November 29, 1965:* Millar called Sims, and that afternoon, he, Bullard and Sims met at Bullard's apartment in Jasper. Bullard showed Sims (a) Bullard's own 1540 kHz frequency study for Sumiton, and (b) Cohen's July 1965 frequency study for Cullman. There is no reasonable explanation [42] as to why Bullard submitted the Cohen-Cullman frequency study to Sims unless it was apparent to all concerned that there, at the least, was a potential that the frequencies which, according to Cohen, "might" work in Cullman, like-

[39] As indicated at note 29, *supra,* we have already rejected footnote 9 of Intervenors' proposed finding, as unsupported by the record. Clearly, Bankson's testimony does not support Intervenors' testimony that it was not until after the return of the Cullman application that they, for the first time, considered the Birmingham market. We also accord no weight to Millar's testimony that on Friday, November 26th—the date of the Bankson conversation—he also ascertained from Cohen, his engineer, based on an "off-the-cuff opinion" that 1540 kHz could be used in Birmingham. According to Millar, he called Cohen, and "he gave me a quick offhand opinion, without making a study, that 5,000 watts would work easily in Bessemer" which is a suburb of Birmingham. (Tr. 768.) There is no record evidence, like a telephone bill, supporting Millar's statement that he, in fact, called Cohen. In addition, Cohen did not even recall ever discussing Birmingham with Millar, although he stated that he would accept Millar's testimony that he did give him an off-the-cuff opinion. However, the Board cannot so graciously accept Millar's testimony. It is our responsibility to weigh and to evaluate the evidence in this very bizarre proceeding. Further, in view of Millar's testimony that on November 26th he asked Cohen for an off-the-cuff opinion only, the Board is constrained to conclude that Millar's subsequent testimony that on Wednesday, December 1, 1965, he also called Cohen (a) to release Cohen from his obligation to him with respect to using the 1540 kHz frequency in Birmingham, and (b) to advise Cohen that he was free to assist the "Sumiton group", is inherently improbable, unreasonable and illogical on the basis of normal business practices. Without question, Millar had not retained Cohen or even evinced to Cohen a serious interest in using the 1540 kHz frequency in the Birmingham market. Accordingly, we are also constrained to conclude that Millar's professed reason for his call to Cohen on Wednesday, December 1, 1965 is a facade in an attempt to protect himself from the Cohen version of his conversation with Millar as reported in Cohen's memorandum, already described at para. 4, *supra.* Finally, we have accorded no weight to Intervenors' testimony that after considering the use of the 1540 kHz frequency for themselves in Sumiton and in Birmingham, they rejected Sumiton because it was too small, and Birmingham because there were too many stations located there. Suffice it to say that these are lame excuses, under the circumstances of this proceeding (see paras. 61 to 64, *supra*), and in no way establish that they were following their counsel's purported *carte blanche* advice.

[40] As officially noticed.

[41] As officially noticed.

[42] Bullard made the following lame excuse which is sheer nonsense, on its face, under the circumstances of this case. He stated:

"We were trying to do Wayne a favor and we wanted to make it clear that we were trying to do Wayne a favor, that we weren't asking Wayne to do us a favor, and we wanted him to see that there were other frequencies available in Cullman and that we were just open with him in our suggestion." (Tr. 975.)

wise, "might" work in Sumiton.[43] As indicated at para. 29, the distance separation between Cullman and Sumiton is approximately 28 miles only.

87. *The Unreasonableness, if not Unreliability, of Intervenors' Explanations that Bullard Did Not Select the 1540 kHz Frequency for Sumiton, and the Unreliability of Intervenors' Proposed Findings that there is No Suggestion in this record that a Superior Frequency was Available for Sumiton*:[44] Whether Sims and Bullard mutually agreed that 1540 kHz was the "best" frequency for Sumiton is a matter of dispute. Intervenors claim that Sims and Bullard both decided that it was the "best", while Sims' testimony indicates that if a different frequency had been selected it would have frustrated Intervenors' objective to block the refiling of the Cullman application. (See para. 3(b), *supra.*) Viewing Intervenors' testimony in its best light, the record establishes that Bullard selected 1540 kHz as the "best" frequency for Sumiton. For it is clear that although Sims may have some elementary engineering know-how, he is not an engineer by profession, and confronted with these studies, for the first time, at a meeting, he would have hardly had time to give consideration to the question of what is the "best" frequency, let alone sufficient time to study the alternatives, assuming *arguendo*, he had the know-how to make such a decision. Sims' engineering know-how, unlike Bullard's sophisticated knowledge, is not demonstrated on this record. (See paras. 46 and 61–64, *supra.*) Moreover, considering the fact that Cohen's June 1965 report indicated a suggestion of the availability of 1090 kHz for Cullman, Bullard's selection of 1540 kHz as the "best" for Sumiton is inherently inconsistent with his testimony that:

> . . . [I]n my years of association in the business I know that the higher you go on the dial, the less sufficient the coverage with the same power. (Tr. 818.)

In this connection, it is to be noted that the record is devoid of evidence indicating that Bullard, prior to suggesting 1540 kHz as the "best" frequency, considered seriously the 1090 kHz frequency.

88. *Millar's Recommendations with respect to the Financial Structure of the Sumiton Company:* The record is clear with respect to this Monday, November 29th meeting that Millar advised Sims concerning the financial capitalization of a Sumiton corporation. Admittedly, Millar suggested Alabama's minimum capital requirement of $3,000, and suggested to Sims that he should be able to get a 33⅓% interest in the station in return for his services if two other stockholders put up $1,000 apiece.[45]

89. *The First Chapman-Ballenger Meeting on November 29, 1965; (Behind-The-Scene Activities):* On the same day as the Monday Sims-Bullard-Millar meeting described above, the record also establishes that

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[43] Bullard's testimony, under further questioning by his counsel, reads, as follows:
"Q. Wasn't the principal purpose, Mr. Bullard, of showing Mr. Sims Mr. Coh[e]n's letter discussing other available frequencies in the Cullman area to suggest alternatives that might be available in Sumiton or which should be discussed?
"A. We discussed my little breakdown and we discussed possible other frequencies, yes, and Mr. Sims confirmed that he believed also that 1540 was the best frequency to file for in Sumiton." (Tr. 975.)

[44] See Intervenors' proposed finding at para. 98 which is rejected because it is unsupported by the record.

[45] Sumiton's capitalization follows, substantially, Millar's recommendations, even though he was mistaken concerning Alabama's minimum requirement.

Ballenger came to Chapman's office, purportedly for a treatment. Chapman could not recall whether he talked to Ballenger specifically about the Sumiton station on that day, or on December 3, 1965, or December 7, 1965, when Ballenger also purportedly came to his office for treatment. However, Chapman's testimony is devoid of any explanation as to why he would have discussed the Sumiton station, specifically, with Ballenger on November 29th or December 3rd in light of his denial that the prior September 1965 Bullard-Chapman discussions centered on Sumiton. Given this state of affairs, Chapman would not have known the purported Sims' Sumiton proposal until Saturday, December 4, 1965, when Sims had his "perchance" meeting with Chapman. Accordingly, if Chapman talked with Ballenger on November 29, or December 3, 1965, there is an inherent contradiction in his own testimony which remains unexplained on this record. In addition, Millar's testimony set forth below in para. 90 *infra*, establishes that Millar knew on November 30, 1965 or December 1, 1965, that the Sumiton investors had decided to proceed with a 1540 kHz application. Hence, on the basis of human experience, there must have been some discussion between Chapman and Ballenger on November 29, 1965, when Ballenger purportedly visited Chapman's office for a treatment. In light of the foregoing, it may reasonably be assumed that there was a Ballenger-Chapman behind-the-scene meeting on November 29, 1965, relating to a 1540 kHz Sumiton application; otherwise, Millar would not have known that they were ready to proceed.

90. *Tuesday,*[46] *November 30, 1965 or Wednesday, December 1, 1965; The Engineer's Memo (para. 4, supra) and The Behind-the-Scene Activities of Intervenors on the basis of the Admitted Facts:* As indicated previously, some of the facts in this memo are disputed by Millar;[47] the facts which he admits that he told the engineer are these: (a) there was on the date of this memorandum a, so to speak, "Sumiton group"; (b) the group consisted of four or five persons; and (c) they

[46] As officially noticed.

[47] More specifically, Millar denied that he instructed the engineer to "proceed with the preparation of the application for 1540 KC in Sumiton, Alabama;" that he stated that "[i]t is desirable to get the application filed before the prior Cullman applicant refiles an application that had been returned;" and that "the Sumiton group has been considering this frequency for many months." The engineer corrected the memo, after Millar's testimony, to indicate that he, himself, suggested that the Sumiton application be filed before the prior Cullman application could be refiled. He also acceded to changing the word "frequency" to station, so that the memo would read "the Sumiton group has been considering a *station* for many months", instead of this *frequency*. He also testified that Millar did not "order" him to proceed, and that the overall import of the conversation was the fact that Millar, in effect, advised him that he had a new client. The engineer also testified that the sentence in the memo reading "we will get site information such as photos and property sketches, business and industrial areas within the community and so forth", meant that "we will have to get site information and so forth. . . ." (Tr. 1242–43.) He further testified that he did not commence work on the application until December 29, 1965, except for acquiring maps and up-dating records on December 1, 1965 and December 10, 1965. For reasons stated in para. 4, *supra*, the Board will not resolve this conflict as to these disputed facts until after we have evaluated the other facts of record and reached an independent conclusion on those other facts. Nevertheless, it is pertinent to point out at this juncture that if, as stated by Millar, and acquiesced in by the engineer, the purpose of this call was merely to bring a new client to the engineer's attention, this memo is devoid of the names of the principals of the "Sumiton group" who would be responsible for the engineering fee; it is also devoid of any specification of a retainer fee; it is also devoid of the terms relating to payment of the fee. Consistent with normal business practices, such information would ordinarily be contained in a memorandum relating to a new client. However, not only is the memo barren of this information, the record is also barren of any other evidence indicating with whom and when the fee arrangement was effectuated. Indeed, it is also devoid of evidence of a cancelled check of the Sumiton company or of any of its principals, evidencing payment by them of either (a) a retainer fee, or (b) any fee whatsoever for the services which the engineer rendered.

wanted to proceed now on the 1540 kHz frequency; they "had been considering a station at Sumiton (but not the frequency) for many months and will proceed regardless of what action the Cullman applicant may [t]ake." However there are contradictions even in these admitted facts, and there are no explanations concerning such contradictions. First, it is to be noted that there is no explanation how Millar knew—two days after his Monday, November 29th meeting with Sims—that there was a "Sumiton group" in existence, and that they had decided to proceed then regardless of whether the Cullman applicant resubmitted its application. Although the record does indicate that Bullard had told Millar of his September 1965 discussions with Ballenger and Chapman (see paras. 66 to 68, *supra*), there was no "Sumiton group", *per se*, at that time. It is also to be recalled that Millar's purpose in selecting Sims—on November 29, 1965—was to have Sims complete the promotion and organization, and the preparation of the application; however, Sims did not meet with Chapman until Saturday, December 4, 1965—several days after Millar's telephone conversation with his engineer. On the basis of human experience, it is evident that if on November 30, 1965 or December 1, 1965, there was a "Sumiton group" and four or five investors who were ready to proceed, there must have been some contact by Millar, or Bullard, with Ballenger and/or Chapman sometime during the three to four day interval between (a) Friday, November 26th, when the Intervenors heard of the return of Cullman application, and (b) the following Monday or Tuesday, when Millar talked with his engineer. On the basis of the foregoing facts and circumstances, the Board believes that, in accordance with human experience, it may reasonably be assumed that there were behind-the-scene contacts by Intervenors with the Sumiton investors.

91. *Friday,*[48] *December 3, 1965; The Second Chapman-Ballenger Meeting:* Ballenger came to Chapman's office, again, purportedly for treatment, according to Chapman's testimony. There is no corroborative testimony by Ballenger that his visit to Chapman's office was, in fact, for treatment.

92. *Saturday,*[49] *December 4, 1965; The Sims-Chapman Meeting:* Sims testified that his first contact with Chapman occurred within five days, on a "Saturday" immediately following the November 29th Bullard-Millar-Sims meeting (Tr. 524), and his testimony is undisputed by Chapman. Consistent (a) with normal and ordinary business practices, (b) with Millar's testimony that he had told Sims that their lawyer had advised Intervenors that it was legal for them to aid in the organization of the "Sumiton group", and (c) with Sims' elation over his opportunity to become a part owner of a radio station, it would seem that Sims would have initiated—quickly—a meeting and held it openly with Ballenger and Chapman. Indeed, it would also seem, on the basis of normal and ordinary business practices, that Millar and Bullard, as creators of the project, would have also been present at such an open meeting, particularly since they had just recently reactivated their broadcast consulting firm, Hudson Millar and Associates. Yet, the record indicates that it was only "perchance" that

[48] As officially noticed.
[49] As officially noticed.

Sims ran across Chapman in the lobby of the Holiday Inn in Jasper, and that Chapman, as usual, asked Sims, "When are we going into radio together?" Sims replied that "he knew of a radio frequency for Sumiton and that an application for this frequency had been filed for Cullman, Alabama, and had been returned by the Commission." (Sumiton Exh. 5, page 3.) Chapman acknowledges in his testimony that Sims gave him this specific information.

93. Hence, it is significant to note that, even on the basis of the Sims-Chapman extraordinary and unusual path of a "perchance" meeting, the record establishes that as of Saturday, December 4, 1965, Chapman knew not only of Bullard's nexus with Millar and WKUL, Cullman, he also knew, on the basis of common sense, that an application which would have resulted in additional competition to WKUL, Cullman, had been returned, and that the frequency of 1540 kHz as proposed by Sims for a Sumiton station was the same one proposed in the Cullman 1540 kHz application. Although it is patently clear that a novice, such as Chapman would have no knowledge of the Commission's strike policy, it is inconceivable, in accordance with human experience and normal business practices, that the novice Chapman who denied that he had had prior discussions with Bullard in September 1965 concerning a Sumiton station, would have instantaneously responded favorably to the Sims proposal, without even discussing with Sims the financial requirements, the potential earnings for such a station, as well as such elementary questions as whether such a Sumiton station would cover Jasper, 10 miles away, and Birmingham, 16 miles away. The record is devoid of such evidence. Nor does the record indicate that considering the prior casual Chapman-Sims relationship, Chapman, consistent with human experience, contacted Bullard, his longtime friend, to seek his advice in view of their more serious discussions concerning radio. Indeed, it is significant to note that this is Chapman's sole explanation concerning his extraordinary and spontaneous interest in the Sumiton project stemming from this "perchance" meeting:

> . . . I knew that an application on 1540 kilocycles had been filed and was returned because of an engineering problem. Whether the engineering problem could be resolved an[d] the application would be refiled, I did not know. I have had a desire for many years to acquire an interest in a radio station, I considered this to be that opportunity and I wanted to proceed promptly. (Sumiton Exh. 5, page 9, para. 16.)

94. However, consistent with Chapman's extraordinary and spontaneous response to Sims' Sumiton proposal, Chapman asked Sims at this "perchance" Saturday, December 4th meeting if he, Sims, was interested in applying for a station and Sims responded that his job at Top Dollar Stores might preclude his participation. Chapman said he would talk to another unidentified person (presumably, Ballenger) was was interested and would talk to Sims later. (Sumiton Exh. 5.)

95. *Tuesday,*[50] *December 7, 1965; The Third Chapman-Ballenger Meeting:* Again, Ballenger came to Chapman's office purportedly for a treatment, according to Chapman's testimony. And, again, it is emphasized that Ballenger's testimony is devoid of any corroborative

[50] As officially noticed.

statements indicating that his visits to Chapman's office on November 29th, December 3rd, or December 7th, were for treatment.

96. *Saturday,*[51] *December 18, 1965; The Sims-Ballenger-Chapman Meeting:* Sims and Chapman went to Sumiton to discuss the Sumiton 1540 kHz proposal with Ballenger. It is undisputed that this was Sims' first and only contact with Ballenger; they did not know each other prior to this meeting. Nevertheless, Ballenger, like Chapman, spontaneously and immediately accepted Sims' proposition. Again, however, it is to be noted that the record is barren of evidence indicating that at any point of time after Chapman discussed with Ballenger the Sumiton project on November 29th, or December 3rd, or December 7th, Ballenger, as a reasonably prudent businessman who did not know Sims, made any inquiries whatsoever to Bullard, his longtime friend and advisor on radio. Nor did Ballenger express any surprise at Sims' appearance on the scene when all of his prior discussions concerning radio had been with Bullard. In the Board's view, this is a bizarre state of affairs. Ballenger, as stockholder and President of Sumiton Gas Company and as a stockholder and Director of The Sumiton Bank, may be said to be a reasonably prudent businessman.

97. *The Reasonable Inference that Ballenger and Chapman Knew of Intervenors' Behind-The-Scene Activities, and Participated in Them:* On the basis (a) of the Board's findings and conclusions in paras. 89 and 90, *supra*, relating to the behind-the-scene contacts or meetings of Chapman, Ballenger, and Intervenors; (b) of the fact that the Sims-Chapman "perchance" meeting does not comport with normal business practices (para. 92, *supra*); (c) of the fact that Chapman's and Ballenger's immediate acceptance and response to the Sims proposition belies human experience, let alone normal business practices (paras. 93 and 96), the Board is of the view that this record is devoid of circumstances indicating that Ballenger and Chapman were innocent bystanders and were duped into the Sumiton project. Quite to the contrary, all of the extraordinary, unexplained facts and circumstances support a reasonable inference that from the beginning, Chapman and Ballenger knew of Intervenors' behind-the-scene activities and participated in them.

98. As we consider the absence of reasonable explanations with respect to these extraordinary and bizarre circumstances, the Board is constrained to point out that there is no rule or principle of law which requires that these bizarre circumstances[52] be accepted as a substitute for affirmative proof which would reasonably explain this situation, or that conclusive effect be given to Chapman's and Ballenger's bare-bone statements as to what transpired, particularly, where as here (a) their bare-bone recitations are inconsistent with human experience and normal business practices, as well as inconsistent with Millar's testimony (para. 90, *supra*); and (b) the truth or falsity of this un-

[51] As officially noticed.

[52] See *Mammoth Oil Co.* v. *United States*, 275 U.S. 13, 52 (1927), where the Court stated, citing *Commonwealth* v. *Webster*, 5 Cush. 295, 316:

". . . when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is, that the proof, if produced, instead of rebutting, would tend to sustain the charge."

usual state of affairs rests exclusively within the bosom of interested witnesses, *viz.* Chapman, Ballenger, Millar, and Bullard.

99. *The Interim Period Between Saturday, December 18, 1965 and Thursday,*[53] *December 23, 1965; Sims Withdraws and Sartain*[54] *Becomes his Successor:* Sometime after the Sims-Chapman-Ballenger meeting on December 18, 1965, Sims decided that he could no longer participate in the Sumiton project because of his duties at Top Dollar Stores. There is no dispute that he advised Chapman of his decision. Both Sims and Bullard believe that Sims might have told Bullard. (Tr. 513–14, 580, 776, 871–72.) However, what occurred thereafter is in a state of a maze of confusion in the record, except the following: Bullard testified that he may even have suggested to Sims that J. L. Sartain might be interested in the Sumiton venture. (Tr. 996.) Sims did contact Sartain, and suggested to him that he become his successor in the Sumiton venture. Subsequently, Sartain attempted to contact Chapman, but found that he was out of town for the holiday season. Sartain then contacted Ballenger, and they met in Sumiton. Ballenger, thereupon, invited Sartain to join the Sumiton group, and at this time Sartain advised Ballenger that he could use assistance in the preparation of the application. During his broadcast career, Sartain had never prepared an application, and did not consider himself competent to do so. Nevertheless, he succeeded Sims in the Sumiton group based upon the same type of arrangement suggested by Millar to Sims—obtaining his stock for his services. The record is devoid of evidence indicating whether either Ballenger or Chapman knew Sartain. It is also devoid of evidence indicating that Ballenger contacted Bullard, his longtime friend and radio consultant to check Sartain out prior to inviting him to join the group. In the Board's view, these silences in the record support the reasonable inference posited previously in para. 97, *supra*, that Ballenger and Chapman knew of Intervenors' behind-the-scene activities, and participated in them.

100. It is undisputed that Sims, after his entry on the scene on December 4, 1965, was in contact with Millar and Bullard, and that they knew that during this four-to-five week period of time since their meeting with Sims on November 29, 1965, little or no progress had been made on the Sumiton application. They also knew that Sims, Chapman, and Ballenger had looked for a transmitter site when they met with Ballenger in Sumiton on Saturday, December 18, 1965,[55] and that Sims had secured some equipment estimates.

101. *Thursday, December 23, 1965; The Bankson-Millar Telephone Discussion of December 23, 1965:* The application for transfer of con-

[53] As officially noticed.

[54] J. L. Sartain is Sumiton's President, Director, and a 25% stockholder, receiving his stock for services, and the proposed General Manager of the station. As of the time he joined the Sumiton group, Sartain had been in the employment of Station WWWB, Jasper, for 12 years, serving in various capacities. He knew Millar, Bullard and Sims.

[55] Bearing in mind that the engineer (note 47, *supra*) had secured maps on or about December 1, 1965 and December 10, 1965, it is significant to note that Ballenger recalled one conversation with the engineer, although he could not pinpoint the date. Ballenger's testimony reads, as follows: ". . . frankly, I can't recall whether I called him or he called me, but what we were talking about was pinpointing the tower site. He was telling me what kind of a map he had there, and he could locate anyplace in the United States if I could just give him a few directional facts. The reason I can remember it so well, it amazed me when he said "You are on the Sipsey Road", and I said, "How on earth could a man in Washington pinpoint a little old road like that." And that is what makes me remember it." (Tr. 610.)

trol of WKUL to Airmedia, Inc. was filed with the Commission. (See para. 44, *supra.*) Bankson also called Millar on that day and his testimony reads, as follows:

> Mr. KRAUS. Now, Mr. Bankson, did you have one or two calls following the dismissal [56] or the return of the initial Cullman Music application with Mr. Millar or Mr. Bullard as to whether assistance of some sort might be rendered by one or both of them to the Sumiton group?
>
> * * * * * * *
>
> Mr. BANKSON. Our *telephone records* for this period reflect, in addition to the call . . . on November 26, well, another call to Station WKUL on December 23, 1965. My actual recollection is that I spoke with Mr. Millar on that occasion. Also, this matter was discussed.
>
> Mr. KRAUS. It was discussed?
>
> Mr. BANKSON. Yes.
>
> (Tr. 1206–07; emphasis supplied.)

Contrary to Intervenors' proposed findings at para. 82, Bankson's testimony quoted above establishes that he did not state that "he believes that it is on this date (December 23, 1965) that he gave Mr. Bullard clearance to assist Mr. Sartain in the preparation of SBC's [Sumiton's] application." The requested finding is totally unsupported by Bankson's testimony.

102. *Late December 1965 (After Christmas);* [57] *Bullard's Reappearance on the scene; the Unreliability of Bullard's and Ballenger's Explanations:* Again, Bullard called on Ballenger to sell him additional clock advertising. It will be recalled that Ballenger had purchased a one-year contract on September 13, 1965 [58]—prior to the return of the Cullman application—at which time Bullard, at the least, was stimulating Ballenger's interest in a Sumiton station. At this time in late December, when Bullard reappeared to sell clock advertising to Ballenger, he, purportedly, "proudly" told Bullard of the Sumiton project as if he and Bullard had never discussed a Sumiton station in September 1965. And although Bullard admittedly knew all about the details of the Sumiton project, *i.e.*, the stockholders, the frequency, etc., including the fact that Sims had left the project and was replaced by Sartain, Bullard did not tell Ballenger that he knew any or all of these details. Considering their longtime friendship, and Ballenger's relationship to Bullard as his "benefactor", Bullard's and Ballenger's explanations of what took place at the late December meeting strains credulity beyond its limits as shown, on the face of Bullard's own explanation. When interrogated as to why he did not tell Ballenger that

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[56] See paras. 9, and 39–42, *supra.*

[57] Ballenger's testimony, unmistakably, sets this time period at "late December" sometime after Christmas, as does Dr. Chapman's testimony. The Board, accordingly, rejects Intervenors' proposed finding, at para. 80, that this time period was "just before or just after Christmas" because Bullard changed his initial testimony to comport with Ballenger's. Intervenors' record citation, Tr. 854, relates solely to Bullard's rhetorical statement, and not to the substance of his testimony which follows:

"Mr. TACY. When, according to your recollection, did you first have a discussion with Mr. Ballenger about assisting in the preparation of the Sumiton application?

"Mr. BULLARD. I had thought . . . that Mr. Ballenger had asked me to assist Mr. Sartain about the third week in December, at a meeting a very few days before Christmas. After listening to the testimony here, particularly, that of Mr. Ballenger, I think it may have been a day or so after Christmas instead. . . ." (Tr. 854.)

[58] See note 30, *supra.*

he knew all of these details concerning the Sumiton project, Bullard stated:

> It just never came up in the conservation. It was just never proper to inject it in the conversation and there was another reason, I guess I might as well state that, that Mr. Chapman did not view Mr. Millar favorably and at least one other member of the Sumiton group did not view Mr. Millar favorably, and if I had told them then they, I felt, would not engage my services to help them and *I wanted to help them and collect a fee for doing so.* (Emphasis supplied.) (Tr. 992.)

103. Considering the fact that if Intervenors, initially, had followed the purported *carte blanche* advice of their own counsel, and had not engaged in this circuitous path, Bullard could have "collected a fee" even substantially larger, Bullard's explanation is the height of unreasonableness, if not lacking in candor. This is equally so with respect to Bullard's explanation of Chapman's dislike of Millar—true as it may be—when considered in the context of the Chapman-Bullard serious prior discussions concerning radio, and Chapman's admitted knowledge of Bullard's nexus with Millar and WKUL. In any event, it was at this meeting sometime in late December 1965 [59] (after Christmas) that Bullard, purportedly, reappeared on the scene solely for the purpose of selling additional clock advertising, and that Ballenger, purportedly, asked Bullard to assist Sartain. As of this time, it is to be recalled again, that (a) the Sumiton company had not been organized, formally; (b) little had been done by Sims in connection with the preparation of an application, other than obtaining equipment estimates and looking at a site; and (c) approximately five weeks had elapsed since Intervenors' first discussion with Sims. It may, therefore, be reasonably stated that as of this time in late December, Bullard knew when he initiated this meeting with Ballenger, that an experienced, on-the-scene hand [60] was needed if the Sumiton application was to be filed at the earliest possible time in order to accomplish Intervenors' transparent objective of naturally discouraging the resubmission of the 1540 kHz Cullman application, and blocking it, effectively, in the event the principals of Cullman could not be so easily discouraged. In short, Intervenors' circuitous path with Sims as their conduit, had been ineffective.

104. *The Unreliability of Bullard's Testimony concerning a Purported After-Christmas Phone Call to Bankson, and the Unreliability of Intervenors' Proposed Findings with respect to Bankson's Purported Advice on December 23, 1965:* According to Bullard's testimony, he did *not* instantaneously and/or definitely accept Ballenger's offer to assist Sartain, which was made at this late December (after Christmas) meeting. Bullard's testimony reads, as follows:

> . . . a second call was made [to Bankson] when Mr. Ballenger asked me to assist Mr. Sartain in the filing of the application. I either did not tell Mr. Ballenger definitely yes at the time he said that and called Mr. Bankson and then

[59] It is also as of this time in late December 1965 that Bullard allegedly recommended Cohen to Ballenger as Sumiton's engineer.

[60] Although it is a commonly known and recognized fact that communications lawyers advise and assist applicants in the preparation of applications for new facilities, the distance separation between these expert law firms which are, in most part, situated in Washington, D.C. and out-of-town applicants, of necessity, slows the process of the preparation of such applications.

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told him yes, or I told him yes and then had Mr. Millar check a second time with Mr. Bankson to definitely establish that it would be proper for me to do so. (Tr. 991.)

As shown by para. 101, *supra*, Bankson's testimony does not corroborate Bullard's testimony. Bankson referred solely to a December 23, 1965 discussion with Millar. The record is also devoid of any other evidence, such as a telephone bill, evidencing that Millar, in fact, did call Bankson after Christmas in accordance with Bullard's testimony. In any event, on the basis of Bankson's prior November 26, 1965 advice, Intervenors had, so to speak, a legal-go-ahead from Bankson that they could assist *solely* in the preparation of an application. However, the record is clear that since the "Sumiton group", *per se*, as of late December 1965 (after Christmas), remained unorganized, Bullard's assistance would, of necessity, include something more than assistance *solely* in the preparation of the application which was the limit of their, so to speak, legal-go-ahead from Bankson. Under this circumstance, there was also presented the question of the propriety of Bullard contributing his services to Sumiton. And it is clear, contrary to Intervenors' proposed findings (para. 101, *supra*), that Bankson did not on December 23, 1965, give Bullard clearance to assist Sartain in what remained to be done.

105. Thus, at this Ballenger-Bullard meeting in late December (after Christmas), they also discussed Bullard's compensation. Ballenger's testimony, in pertinent part, reads, as follows:

. . . I asked him, when I saw him, *how much we owed him, how much we were going to owe him* . . . what kind of expenditures we were going to have. (Emphasis supplied.) (Tr. 595.)

According to Ballenger, Bullard replied:

We won't have any differences about the amount of money. I have always treated you fair and I will now. (Tr. 595.)

106. *The Unreliability of Ballenger's and Chapman's Testimony that they had No Knowledge of Intervenors' behind-the-scene activities and were Not participants in them:* In para. 97, *supra*, the Board has concluded that the facts and circumstances as of December 18, 1965, supported a reasonable inference that sometime prior to Sims' entry on the scene on Saturday, December 4, 1965, Chapman and Ballenger not only knew of Intervenors' behind-the-scene activities, they were participants in them. In para. 99, *supra*, we further concluded that all of the unusual, unexplained, facts and circumstances surrounding Sartain's replacement of Sims, supported this reasonable inference. We also believe that Bullard's and Ballenger's incredible explanations concerning Bullard's reappearance on the scene as detailed in para. 102, *supra*, add additional support to this inference. Now, bearing in mind the underscored portion of Ballenger's testimony that he asked Bullard "*how much they owed him*" (emphasis

supplied)[61] as of late December, 1965, it is patently clear that this admission that Sumiton owed Bullard money as of late December 1965, is an inherent recognition and admission of the fact that Bullard had rendered behind-the-scene services since the return of the Cullman application in November 1965. We believe that Ballenger's admission translates our prior inference into a proven fact. For it is clear that when all of these facts and circumstances are considered together, collectively, there is not only stringent proof of a reasonable inference, there is substantial evidence here upon which to conclude that Ballenger and Chapman—after the return of the Cullman application—knew of Intervenors' behind-the-scene activities and participated in them.

107. In this connection, it is to be noted that although Sims' testimony is disputed in substantial respects as shown in para. 3(b), *supra*, it is undisputed that he did not tell Chapman and Ballenger of Intervenors' behind-the-scene activities. On the basis of our conclusion here, it is evident that Sims did not have to tell them; they already knew.

108. *Sometime after the late December 1965 Bullard-Ballenger Meeting; Ballenger's and Chapman's Unusual Agreement to purportedly pay Bullard for his services to Sumiton; the Unreasonableness of their Explanations:* Bullard discussed the question of compensation with Millar, and they decided that compensation should not be paid to Hudson Millar & Associates, their broadcast consulting firm because "Mr. Bullard wanted to do it himself." (Tr. 780.) According to Millar, it never "cross[ed] our mind . . ." that compensation could have been paid to Hudson Millar and Associates, and then turned over to Bullard, as his fee. (Tr. 781.) The sole question, according to Millar, "was whether or not he and I would share the deal or whether he should get it entirely." (Tr. 781.) Intervenors also claim that a decisive consideration was the fact that Bullard, at this time, was essentially unemployed, and needed the money. (Tr. 777.)

109. After the Millar-Bullard agreement that Bullard be paid, personally, for his assistance to Sumiton, Bullard contacted Ballenger and suggested that Ballenger and Chapman simply buy clock advertising. (Tr. 597.) It will be recalled that Ballenger purchased a one-year clock advertising contract in September 1965. The record also indicates that when Bullard, initially, called upon Ballenger after Christmas 1965, Ballenger refused to buy additional clock advertising because his September contract ran for one year. (Tr. 691.) Nevertheless, at this time, Ballenger agreed to additional subscriptions.

[61] Intervenors' proposed findings at para. 90 distort Ballenger's testimony quoted above at para. 106, *supra*, to read as follows: Ballenger asked Mr. Bullard "how much he was going to charge me." While in an ordinary case, there would be no substantial significance attached to this distortion, or to Ballenger's testimony set forth above, inquiring of Bullard "how much we [then as of late December 1965] owed him", this is not an ordinary case. We, accordingly, have attached weight to these factors. Significantly, nowhere have Intervenors or Sumiton attacked any portion of Ballenger's testimony as being biased or unreliable, although they did attack the reliability of Fowler (Ballenger's longtime business associate who initially joined the group). See, Intervenors' Brief, page 2.

Similarly, the record establishes that Chapman refused to buy clock advertising from Bullard in September 1965, although he did purchase some in late December, after Christmas.

110. The Board cannot attach any weight to Intervenors' testimony, under the bizarre state of affairs in this record, that Bullard at this period in late December 1965, needed the income he could derive from assisting the "Sumiton group" because he was essentially unemployed. As shown by para. 44, *supra*, after WARF, Jasper, was sold and Bullard returned from his vacation he expended approximately one-third of his time to the investigation of markets which were in need of additional and new stations, and to other promotional activities for Airmedia, Inc. Airmedia was incorporated on November 3, 1965; on December 23, 1965, an application for transfer of control of WKUL to Airmedia was filed, and it was approved January 13, 1966, effective January 17, 1966. Subsequently, Bullard became General Manager of WKUL, Cullman. Neither Bullard's nor Millar's testimony is revealing as to Bullard's stock interest in Airmedia, either initially, or when he became General Manager, despite the fact that in a different context relating to the reasons why Millar suggested that Sims receive his stock for services (para. 88, *supra*), Millar, unequivocally, testified that it was "the usual custom of the area . . . to give the manager . . . his stock purely for services." (Tr. 793–94.) Millar also, in this same context, testified that "it doesn't make sense" for other stockholders to "have his services free." (Tr. 799.)

111. *Bullard—Openly—Commences his Assistance in late December 1965:* On the basis of the above-described unusual fee arrangement, it is undisputed that Bullard openly re-entered the Sumiton scene and commenced assisting Sartain in what remained to be done with respect to the organization of the Sumiton company and to the preparation of the application.

112. *December 29, 1965:* The engineer (note 47, *supra*) commenced work on the engineering portion of the application; apparently, he was provided with the indispensable site information by Bullard and Sartain, as of this time, although the record does not establish this as an acknowledged fact.

113. *Monday,*[62] *January 3, 1966; Sumiton's first organizational meeting:* A meeting was held at the home of Sartain. Those present were: Ballenger, Fowler, Chapman, Sartain and Bullard. Although there is no dispute in the record that prior to Christmas, Sims had advised Chapman that he could no longer participate in the Sumiton venture, and that Ballenger had selected Sartain as Sims' successor, Chapman, nevertheless, inquired as to Sims' whereabouts as if Sims had not previously advised him of his withdrawal. Chapman also expressed great shock and surprise at Bullard's presence at the meeting by exclaiming, "What in the world are you doing here?" The Board has previously concluded at para. 106, *supra*, that Ballenger and Chapman not only knew of Intervenors' behind-the-scene activities, they participated in them. Thus, considering the prior circuitous paths followed by Intervenors, Ballenger and Chapman to disguise their behind-the-scene

[62] As officially noticed.

activities, it is no wonder that Chapman, having been out of town during the holiday season, expressed astonishment at Bullard's open reappearance on the Sumiton scene at this January 3, 1966 first organizational meeting.

114. *Friday,*[83] *January 7, 1966; Bullard's Open Assistance to Sumiton for the Period commencing Late December 1965; the Unreliability of Intervenor's Proposed Findings and Contentions that Bullard's Conduct prior to this time was, likewise, Open and Public:* Sumiton Broadcasting Co., Inc., is incorporated, at the minimum Alabama capitalization of $2,000.00. This essentially is what Millar had initially advised, although he was mistaken as to the amount; he thought it was $3,000.00. The stockholders, officers and directors are: Sartain, as President; Ballenger, as Vice President; Chapman, as Treasurer; and Fowler, as Secretary. Each held 25% of the stock, with Sartain receiving his stock for services as recommended by Millar, initially to Sims. The program section of Sumiton's application is also dated January 7, 1966, and is signed by Sartain. In this connection, it is to be recalled that Millar testified that commencing in late December when Bullard began assisting the "Sumiton group", his assistance was common knowledge in the area. (See note 28, *supra.*) Even though the Commission deemed Sumiton's community ascertainment showing to be deficient (note 28, *supra*), the showing reveals that 12 community leaders, albeit unidentified, were contacted. When considered with Millar's testimony, the Board believes that this evidence justifies a finding that for the period commencing in late December 1965 and until the preparation of the application was completed, Bullard's assistance was common knowledge in the area. However, his open assistance at this time, contrary to the implications of Intervenors' proposed findings at para. 93, does not vitiate the behind-the-scene activities which took place up until this time. In this connection, it is to be noted that with respect to Bullard's open assistance to the "Sumiton group" beginning in late December 1965, the Presiding Judge expressed disturbance about a line of testimony relating to his assistance as of this time. The Presiding Judge stated:

> Nobody has suggested that [Mr. Bullard's assistance to Sumiton] was done surreptitiously. There is not one scintilla of evidence that I know of that has been offered that he sneaked around doing it . . . Don't cogitate up things. (Tr. 1103.)

Examination of the Judge's comments reveals that they are geared specifically to a line of questioning by Intervenors' counsel concerning the period Bullard assisted Sartain in the preparation of the application. (Tr. 1102–03.) Counsel asked Sartain, "During the time that you worked with Mr. Bullard on the Sumiton application, was Mr. Bullard wearing a disguise of any kind?" Sartain answered, "No, sir." And it is in connection with this limited period of time involved in the preparation of the Sumiton application that the Judge made the above-described observation. However, at para. 93 of the Intervenors' proposed findings, as well as other incidents in its findings, exceptions and brief, Intervenors have attempted to use this observation of the Judge as

[83] As officially noticed.

applicable to a broad overview of Intervenors' entire conduct as reflected by this record. Those findings, exceptions and contentions are clearly unsupported by the Judge's comment or the evidence in this record.

115. *Bullard's Participation in All Phases of the Preparation of the Sumiton Application; Purported Payments by Ballenger and Chapman to Bullard for His Services and Not for Clock Advertising; the Unreliability of Their Explanations concerning such Payments:* Sartain testified that he and Bullard worked together on practically all of the application and that they spent seven to ten days on the project with an average of about eight hours a day devoted to it. (Tr. 1079–81). Although Bullard admitted that he assisted Sartain until the application was completed and ready to be mailed to Ray Paul, Sumiton's communications attorney, he, nevertheless, testified that despite all that had occurred here relating to Sartain's inability to fill out the application and the compelling need for his (Bullard's) services, he performed "clerical chores." (Tr. 981.) For reasons which will appear below, the Board rejects Bullard's description of his participation in the preparation of the Sumiton application as inherently improbable, and inconsistent with other facts and circumstances in this record, as well as inherently contradictory with Bullard's other testimony.

116. *Tuesday,*[64] *January 11, 1966; Bullard Recommends Paul, as Sumiton's Communications Counsel; Sumiton's Payment of a Retainer Fee; the Mailing of the Completed Application and the Retainer Fee to Him:* Admittedly, Bullard recommended Paul to Sartain, as communications counsel, although there is no evidence indicating the specific date Sartain contacted Paul, in accordance with Bullard's recommendation. There is also no evidence indicating, specifically, the date Bullard and Sartain completed the Sumiton application and mailed it from Jasper, Alabama, to communications counsel, *for filing;* however, the evidence shows a check drawn by the Sumiton company to Ray Paul, dated January 11, 1966, in the amount of $500, as a retainer fee. On the basis of the undisputed facts that (a) Bullard and Sartain commenced work on the application the latter part of December 1965; (b) the engineer, likewise, commenced his work on the application on December 29, 1965; (c) according to Bullard's own testimony, when the application was mailed to communications counsel, it had been completed and he assisted Sartain until it was completed (Tr. 861), the Board believes that it may reasonably be assumed, in accordance with normal business practices, that the check, dated January 11, 1966, accompanied the completed application which was transmitted to communications counsel, *for filing.* In this connection, it is emphasized that the record is devoid of evidence indicating that during the seven-ten day period Bullard and Sartain prepared and completed the Sumiton application they called upon communications counsel for advice or instruction, where, under those circumstances, the retainer fee check, in the normal course of business, would have been sent to counsel prior to the completion of the preparation of the application.

[64] As officially noticed.

As indicated above, the record is even silent as to when communications counsel was initially contacted.

117. *Thursday,*[65] *January 13, 1966; Commission Approval of the WKUL-Airmedia Transfer Application:* As shown at para. 101, *supra*, the transfer application of WKUL to Airmedia was filed with the Commission on December 23, 1965, and it is on this same day that Intervenors' proposed findings at para. 82 erroneously indicated that Bankson believed he advised Millar that he gave Bullard clearance to assist Sartain. As previously concluded, this proposed finding is totally unsupported by Bankson's testimony. On January 13, 1966, the Commission approved this transfer, and on January 17, 1966, the transfer was consummated [66] and completed by the parties. As of that date, Millar and Bullard, as principal stockholders of Airmedia, became, so to speak, the stewards of WKUL, Cullman; however, since this company (para. 44, *supra*) was planned as a publicly-held company, it is apparent that there were new and additional stockholders as of the time of the transfer, or shortly thereafter.[67] Obviously, if the Commission, prior to its action, knew of Intervenors' conduct here, the WKUL-Airmedia transfer could have been adversely affected; at the least, the action would have been deferred pending investigation. Similarly, it is patently clear that if the facts now shown by this record had been brought to the Commission's attention prior to the expiration of the thirty-day period provided for reconsideration relating to Intervenors' instigation of the application, and to Bullard's substantial participation in its preparation, the grant could have been set aside, irrespective of whether it had been consummated.

118. *Saturday,*[68] *January 15, 1966; Bullard Receives Payment from Chapman and Ballenger:* The record includes a copy of a cancelled check, dated January 15, 1966, issued by the La Petite Beauty Salon (owned by Chapman and his wife) to Bullard, in the amount of $120.00, in payment of Chapman's pro-rata share for either Bullard's services rendered to Sumiton, or for the clock advertising. Ballenger

[65] As officially noticed.

[66] As officially noticed.

[67] It is to be noted that Intervenors' Brief, at page 3, reads, as follows: "Intervenors are associated with a small public company (Airmedia, Inc.) which has been unable to obtain a renewal for one of its three stations, WKUL in Cullman, Alabama, or conduct normal corporate activity (except to operate under the severest of clouds its three stations). Airmedia's small stockholders have had assets which are to them substantial essentially frozen and, worse than that, put in serious jeopardy. Intervenors have themselves been forced to try to explain endlessly the extraordinary length of this proceeding, to try to help meet the emergency needs of distressed stockholders, and to face a constant undercurrent of adverse community and stockholder comment about their apparent difficulties with the federal establishment."

Unfortunately, it seems that Intervenors have failed to tell their stockholders of their course of conduct depicted by the facts of record in this proceeding, and that the "federal establishment" had no knowledge of their conduct (a) when it acted upon the Airmedia-WKUL transfer on January 13, 1966, or (b) when it acted upon the transfer of WIRA and WOVV–FM, Fort Pierce, Florida, to Airmedia on September 16, 1967. The first information concerning Intervenors' conduct was the Petition to Enlarge Issues, filed June 24, 1968, by the Cullman applicant in this proceeding. Contrary to the implications of Intervenors' position, that petition was timely filed; there was no duty which evolved upon the principals of the Cullman application to bring the alleged facts concerning Intervenors' conduct to the Commission's attention prior to the time of the filing of the petition. However, there can be no question of Intervenors' duty to both the Commission and its stockholders. As stated in *Granik, supra*, "Good faith and fair dealing bear upon the public interest." Moreover, contrary to Intervenors' contentions they were not "dragged into this case" by fictitious or speculative strike allegations (see Intervenors' Brief, page 3), (a) as shown by the Board's Memorandum Opinion and Order, *supra*, adding the strike issue, and (b) the facts detailed in this Decision.

[68] As officially noticed.

made his payment, in the total amount of $240.00, to Bullard by a personal check, dated January 19, 1965, although he had taken the ads for the B & F Lumber Company and the Sumiton Gas Company. (Tr. 605.) See para. 23, *supra*. As Ballenger explained this transaction, the amount he paid to Bullard was subsequently charged to these companies as a cash item.

119. The record is replete with testimony as to whether the agreed Ballenger-Bullard-Chapman method of purportedly paying Bullard for his services through the medium of the clock advertising payments is consistent with normal business practices in the Sumiton-Cullman area. Although they saw nothing unusual about this method of payment, the Board is in full accord with the observations of the Presiding Judge [69] which read, as follows:

> Presiding JUDGE. You two [Ballenger and Fowler], and Chapman, bought how much?
> Mr. BALLENGER. $360.00.
> Presiding JUDGE. $360.00 worth of clock advertising and say it was for services rendered?
> Mr. BALLENGER. That is exactly right.
> Mr. KRAUS. I——
> Presiding JUDGE. What? You don't like the answer?
> Mr. KRAUS. I object to the characterization of the witness' testimony because I don't think that it is precisely what the witness was saying.
> Presiding JUDGE. What was his last two words, Mr. Kraus? "That's right" is what he said.
> Mr. TACY. I think it is clear now.
> (Tr. 604–05.)

120. In reaching our conclusion that we agree with the Judge's observations, we have carefully considered Bullard's protestations which read, as follows:

> . . . it was stated this morning that I really sold the ad space and threw in my services, but, Mr. Examiner, it was the other way around. I sold them my services and I threw in the ad space. (Tr. 848–49.)

121. We also agree with the Judge's observation, that in point of fact, Bullard was paid only $9.00 for his services to Sumiton. And, again, we have considered Bullard's reply:

> Well, that just was not the case. It was misstated this morning that I sold them the ads and had thrown in my services. All I can say is that it was honestly the other way around. (Tr. 851.)

122. In short, the Board also agrees with the findings of fact and conclusions of the Initial Decision that Bullard received only $9.00 for his services in assisting, substantially, with the organizational aspects of the Sumiton company and the preparation of the application. We do not accept Bullard's protestations to the contrary because the question as to whether this unusual method of payment comports with local custom [70] in the Cullman-Sumiton area is not established in this record by reliable testimony. The Board has found previously that, in sig-

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[69] We also agree with another salient observation by the Presiding Judge, which reads, as follows: "This just equals to a *double billing*. . . . It is kind of a bonus, "I will throw in the services if you will take so much clock advertising." Is that what it amounts to?" (Tr. 599; emphasis supplied.)
Equally salient is Ballenger's reply to this observation by the Presiding Judge: He answered, unequivocally, "Yes." (Tr. 599–600.) See also, Tr. 598–605, where it is clear that Ballenger understood the meaning of "double billing."

[70] See note 69, *supra*; also Tr. 598–605.

nificant respects, Bullard's and Ballenger's testimony is deemed to be unreliable. Moreover, even if we accepted Bullard's explanation, we do not believe that this one factor, standing alone, is sufficient to overcome the other clear and convincing evidence of strike conduct.

123. *Monday,*[71] *January 24, 1966; the Sumiton Application is Tendered for Filing; the Changes in the Application after it was Completed by Bullard and Sartain and Mailed to Communications Counsel, For Filing; the Silence of the Record as to any Explanations or Reasons for these Changes; the Unreliability of Bullard's Inherently Inconsistent Testimony that he Performed Clerical Chores Only with respect to Sumiton's Application:* As shown by para. 88 of Intervenors' proposed findings, the Sumiton application is dated January 21, 1966, and is signed by Sartain; the programming portion is dated January 7, 1966, and is signed by Sartain. Likewise, the Bylaws are dated January 7, 1966. However, the Gates equipment letter is dated January 18, 1966, approximately seven days after the completed application was mailed from Jasper. The engineering portion of the application is dated January 17, 1966, and is signed by the engineer; however, it, too, is dated approximately six days after the completed application was mailed from Jasper to communications counsel, for filing. The Sumiton bank loan commitment, in the amount of $47,000, is dated January 21, 1966, or ten days after the completed application was mailed from Jasper. Significantly, all of these documents, other than the ones dated January 7, 1966, are dated either the same date, *viz.* January 17, 1966, the date of Airmedia's consummation of the WKUL transfer, or thereafter.

124. All of the dates of the above-described documents are set forth in para. 88 of Intervenors' proposed findings. It is, accordingly, evident that Intervenors were well aware of the existence of the documents which are dated after January 11, 1966, when the application was completed and mailed to communications counsel, for filing. Yet, the record is silent as to any explanations concerning this unusual state of events or the reasons for the changes which patently took place, despite the fact that Intervenors' Brief, at page 3, reads, as follows:

> . . . *for more than four years,* Intervenors have been forced to devote very substantial time, energy and funds to the defense of their "character" in . . . [this] proceeding. . . . (Emphasis supplied by Intervenors.)

Similarly, it will be recalled (note 11, *supra*) that many months prior to the commencement of the hearing in this proceeding, Intervenors in seeking rights for expanded participation—which they were permitted—also stated that the strike issue "requires them to defend themselves and their past conduct in this very proceeding."

125. Suffice it to say that these silences in this record relating to the reasons for the changes which occurred in the application cannot be deemed to support Bullard's inherently contradictory statement that he performed "clerical chores" only in connection with the preparation of the Sumiton application, in light of the other undisputed facts that (a) Sartain and Bullard worked 7–10 days in the preparation of all phases of the application; (b) Bullard was hired by Sumiton because

[71] As officially noticed.

Sartain did not have the required experience to prepare the application; and (c) even by Bullard's own testimony, he worked with Sartain until the application was completed and ready to be mailed to communications counsel, for filing.

126. As stated in *Mammoth Oil Co., supra*, when stringent proof of circumstances is produced, tending to support a charge, (*i.e.*, here, that Bullard substantially participated in the organization and the preparation of the Sumiton application), a burden is imposed on an accused to come forward with evidence consistent with his innocence. Here, despite the fact that Intervenors have acknowledged (see para. 124, *supra*) that they were required to defend themselves and their "character" in this proceeding, there is no explanation relating to these changes, let alone proof that these changes vitiated the previous work performed by Bullard in the preparation of the Sumiton application, and reduced his participation to clerical chores to support his inherently contradictory testimony. For example, there is no indication, let alone proof, of the fact that Sumiton's communications counsel discovered fatal mistakes in the completed application mailed to him by Sartain and Bullard, and that such fatal mistakes were required to be corrected before the application could be tendered for filing. In addition, the Airmedia-WKUL grant on January 13, 1966 provides a motive for Bullard's contradictory statement that he performed only clerical chores. For it is apparent that a Sumiton application, prepared and completed by Sartain and Bullard, on or about January 11, 1966, under circumstances where Intervenors instigated the application, would have constituted *prima facie* proof of a strike application. Hence, all of the elements relating to strike conduct would have been a *fait accompli* prior to Commission action approving the WKUL-Airmedia transfer, under circumstances where the Commission could have no knowledge of such misconduct. *Cf. National Broadcasting Company, Inc.*, 37 FCC 427, 2 RR 2d 921 (1964). See also Section 312 (a) (2) of the Communications Act of 1934, as amended, relating to revocation of station licenses.

127. For all of these reasons, the Board rejects Bullard's inherently contradictory statement that he performed clerical chores only with respect to the preparation of the Sumiton application; it is, without question, unreliable. The Board also concludes that Bullard substantially participated in the organization of the Sumiton company and the preparation of the Sumiton application which was completed for filing, prior to Commission action of January 13, 1966, when it granted the Airmedia-WKUL transfer without knowledge (a) of Bullard's substantial participation in the preparation of that application; and (b) Intervenors' prior instigation of that application. *Cf. National Broadcasting Company, Inc., supra*, at 446–47, 2 RR 2d at 945–46. See also note 67, *supra;* see also Section 312(a) (2) of the Communications Act, *supra*.

128. *Thursday,*[72] *February 4, 1966; Local Public Notice of the Filing of the Sumiton Application; One of the New Owners of WARF, Jasper, Calls on Bullard; Bullard's Departure to Maryland for a Six-*

[72] As officially noticed.

Month Period: For the reasons already stated in para. 114, *supra*, the Board has previously concluded that Bullard's participation in the preparation of the Sumiton application was common knowledge in the area. The affidavit of publication indicates that there was local publication on February 4, 1966, February 11, 1966, and February 18, 1966. According to Bullard's testimony, during "the first week in February", one of the new owners of WARF, Jasper, which had been sold to them by Millar in June 1965 with a five-year covenant not to compete in Walker County (see para. 63, *supra*) called upon Bullard to express his "displeasure." Considering the covenant not to compete and the fact that "good faith and fair dealing bear upon the public interest", (see *Granik*, *supra*) it is, indeed, no wonder that the new owners of WARF were displeased by this turn of events.

129. Sometime shortly after this meeting of one of the WARF new owners with Bullard, Bullard left the Cullman-Jasper area to work in Maryland, where he lived until August 1966, when he returned to Jasper. (Tr. 861–62.) Since November 1966, Bullard has been President, Director, and General Manager of Cullman Broadcasting Co., Inc., licensee of WKUL. Cullman Broadcasting Co., Inc. is wholly owned by Airmedia, Inc. of which Bullard is Vice President and Director and a 9.04% Class A stockholder and 5.7% Class B stockholder.

130. *April 14, 1966, Cullman Resubmits its 1540 kHz Application; Bullard's Meeting with Bankson:* On this date, the Cullman application was resubmitted to the Commission. Shortly thereafter Bullard was advised of this fact. Bullard's testimony with respect to his reaction to the resubmission of that application reads as follows:

> When I learned, while in Maryland, that the Cullman application had been resubmitted for filing on 1540, I was surprised and somewhat upset. I think I went to Mr. Bankson in person in Washington because I was only an hour's drive away.
>
> And I talked with him regarding the application, and expressed my opinion that if I did anything further with these people [the Sumiton group] in any way I would be in a position of a conflict of interest. He concurred I would be. (Tr. 862–63.)

Significantly, it is to be noted that, again, Bankson's testimony, set forth below, does not corroborate the details of Bullard's testimony.

> Mr. TACY. Getting back to this meeting that took place on that hot summer day.
>
> Mr. BANKSON. Yes.
>
> Mr. TACY. If you can recall, was it your impression that Mr. Bullard came to see you right after the application was refiled and for the principal purpose of seeking your advice on what, if anything, he could do from that point?
>
> Mr. BANKSON. *I am sure that he did not.* I would answer it that way.
>
> Mr. TACY. It was just in connection, as you testified, with other matters?
>
> Mr. BANKSON. As I recall the discussion, it was an affirmation on my part of something Mr. Bullard knew from previous discussions. . . . (Tr. 1212–13; emphasis supplied.)

THE STATE OF THIS RECORD RELATING TO PROOF OF PAYMENT OF THE ENGINEER'S FEE BY SUMITON

131. Despite the fact that (a) Sumiton had a burden of proof in this proceeding to establish that it has the qualifications to be a broadcast licensee; and (b) Intervenors have acknowledged that they were re-

quired to defend themselves and their "character" in this proceeding (see para. 124, *supra*), there follows a detailed account of the bizarre and suspicious state of this record with respect to the payment of the engineer's fee. Chapman, who served as Treasurer and a director, of the Sumiton company testified, as follows:

> We retained the firm of George Davis and Associates to do the engineering. I have requested this firm to deliver to Ray R. Paul, Esq., an affidavit concerning his employment and payment. (Sumiton Exh. 5, page 8, para. 15.)

Ballenger, Vice President and a director of Sumiton, also testified; his testimony reads, as follows:

> Mr. TACY. Did you know, Mr. Ballenger, as Vice President of this company—or, rather, not in your official capacity, but as a member of this group, do you know who did, in fact, employ Mr. Julius Coh[e]n?
> Mr. BALLENGER. No, sir. I mean it would strictly be a guess, but I would say J. L. Sartain, but I don't know. I really don't.
> Mr. TACY. I am sure you know who paid him?
> Mr. BALLENGER. *Yes, I know who paid him.*
> (Tr. 611; emphasis supplied.)

132. Ballenger never revealed, specifically, on this record who paid the engineering fee despite Sumiton's burden of proof in this proceeding. With respect to the engineer's testimony, the record reads, as follows:

> Mr. PAUL. Who paid you for your services in connection with your work on this application?
> Mr. COHEN. All of the cost was paid for by the Sumiton Broadcasting Company. Mr. Sartain and Mr. Ballenger—well, I presume they did.
> Presiding JUDGE. Who signed the checks?
> Mr. COHEN. The checks?
> Presiding JUDGE. Yes.
> Mr. COHEN. I don't know. I did not see them at the time.
> * * * * * * *
> Mr. PAUL. Did you ascertain from . . . [your retired partner] . . . as to who paid the bill?
> Mr. COHEN. Yes, I asked him.
> Mr. PAUL. Who did . . . [he] tell you paid the bill?
> Mr. COHEN. Sumiton Broadcasting paid the entire bill.
> Presiding JUDGE. Did he indicate who signed the checks at the time?
> Mr. COHEN. *I did not ask him.*
> (Tr. 1219–1220; emphasis supplied.)

133. With respect to the engineer's testimony, it is significant to note that, as pointed out by the Judge, there is not only no indication as to who signed the check, there is also no indication by the engineer as to whether his retired partner's statement is based on recollection only, or whether his retired partner checked his office records to determine this information. More importantly, there is also no indication as to whether this firm maintains records, in accordance with their normal business practice, of recording the source and the drawer of each check. For all of these reasons, in addition to the overall bizarre state of affairs reflected by this record, the Board cannot attach any weight to the statement of the retired partner that Sumiton paid the fee; it is hearsay evidence when viewed in its best light, quite apart from the other inadequacies. Moreover, on the basis of ordinary controlling principles of evidence, there were various methods of proof open to Sumiton and to Intervenors which could have been followed separately or in com-

bination, to establish, as they contend, that Intervenors, neither directly nor indirectly, paid the engineer's fee, other than the self-serving generalized [73] statements by all of the interested witnesses, *viz.* Bullard, Millar, Chapman, and Ballenger whose testimony has previously been found, in several substantial respects, to be unreliable. First, Sumiton could have produced a cancelled check of the (Sumiton) company or its principals which would have been the best evidence of payment by Sumiton of the engineering fee. If the check was lost, Sumiton could have explained this fact, and offered, in lieu of the cancelled check, the check stubs for this period as records made in the regular course of business. Absent the availability of check stubs for this period, it could have shown that it made appropriate inquiries to the bank to obtain, if available, microfilm copies of the cancelled check or checks. If this was unavailing, both Sumiton and Intervenors could have required the retired partner of the engineering firm to appear and to testify in this proceeding in order to explain whether his statement that Sumiton had paid the fee was based merely upon his recollection of events which transpired several years ago, or upon office records maintained by this firm, in accordance with their normal business practices, which showed the source and the name of the drawer of the check.

134. Indeed, in the bizarre circumstances of this case, we cannot perceive of more basic and fundamental avenues of approach to resolution of the suspicious state of this record relating to payment of the engineer, and to support Intervenors' and Sumiton's protestations of innocence. However, both Intervenors and Sumiton chose to ignore all of these well-established evidentiary paths. For all of these reasons, the Board is constrained to follow the teachings of *Mammoth Oil Co.*, *supra* (see note 52, *supra*), and to conclude that in light of all the alternative paths which could have been followed by Intervenors and Sumiton to establish that the engineering fee was not paid by Intervenors, directly or indirectly, the "natural conclusion is, that the proof, if produced, instead of rebutting, [the suspicious circumstances that Intervenors paid the fee, either directly or indirectly] would tend to sustain the charge."

SUMMATION OF FACTS AND CIRCUMSTANCES AND CONCLUSIONS

135. Without regard to the testimonial conflicts described at paras. 3 and 4, *supra*, the Board has found and concluded that Millar "threatened" Mitchell with the filing of an economic protest shortly after the Cullman application was filed; that Intervenors stimulated the interest of Ballenger and Chapman in a Sumiton station in September 1965—approximately two months prior to the return of the Cullman application; that they knew or had reason to suspect at that time that the 1540 kHz frequency could be used in Sumiton and that it would block the then-pending 1540 kHz Cullman application; that after the Cullman application was "returned" in late November 1965, they knew on the basis of their own personal experience that it did

[73] See Intervenors' exception No. 24(c) relating to the generalized statements of Millar, Bullard, Chapman and Ballenger, which we deem unacceptable in the circumstances of this case.

not have the status of a "dismissed" or "withdrawn" application; that they, nevertheless, took the delusive liberty of assuming that it would not be refiled without taking the most elementary precaution of checking with the Cullman applicant; that they instigated the completion of the organization of the Sumiton company and the preparation of the 1540 kHz Sumiton application; that they assisted substantially in the organization of the Sumiton company and the preparation of the Sumiton application which was completed for filing—prior to January 13, 1966—when the Commission granted the Airmedia transfer of control application relating to WKUL, Cullman, without knowledge of any of these facts. See paras. 123–127, *supra*.

136. More specifically, we also concluded that Intervenors selected the frequency for the Sumiton company; they promoted the investors; they recommended the financial structure of the Sumiton company; they selected the engineer and communications counsel; they paid the engineering fee; Bullard contributed his services to the applicant for the nominal consideration of $9.00; and Millar contributed his, without any compensation. We have further concluded that (a) Intervenors' path of conduct has been bizarre and circuitous; (b) their explanations relating to their conduct, when viewed in their best light, are unreasonable or unreliable; (c) they acted contrary to their own lawyer's advice; and (d) they knew—as a matter of fact, on the basis of their own extraordinary knowledge and background in the radio field—they were engaged in a deliberate path of misconduct. In short, it is our view that when the foregoing facts and circumstances and conclusions are considered, collectively, there is a chain of events establishing that Intervenors, knowingly and deliberately, engaged in a path of conduct designed not only to dissuade Mitchell from further prosecution of the Cullman application prior to its return, but, in addition, to block a resubmitted Cullman 1540 kHz application if Mitchell could not be otherwise induced to abandon the resubmission of such an application. These are our independent conclusions without regard to the testimonial conflicts described in paras. 3 and 4, *supra*.

137. Analysis of the conflicts of testimonial evidence described at para. 3(a) relating to Mitchell's reaction to Millar's purported discussion of an economic protest, as "a threat", shows on its face that Mitchell's reaction is not fiction when considered in light of the facts set forth in paras. 34–37 and 52–54, *supra*. Simply put, the test by which Millar's conduct must be measured, is whether a "threat" of an economic protest by an existing licensee to a novice, like Mitchell, reasonably relates to the adversarial posture an applicant exposes itself to in a reasonable search of their credentials to become broadcast licensees. As stated in *Chronicle*, *supra*,[74] our interest is not in an applicant's or a witness' subjective reaction to an investigation; however, our interest is "whether a substantial question has been raised that the investigation itself went beyond the reasonable and permissible bounds." *Id.* at 245. In our view, a threat of an economic injury protest by an existing licensee, particularly to a novice, like Mitchell, goes far be-

[74] See note 15, *supra*.

yond the bounds of permissible investigation, as well as permissible negotiation.

138. With respect to the other testimonial conflicts relating to Sims' testimony described at para. 3(b) and the engineer's memo described at para. 4, there is no question that Sims' testimony and the facts stated in the engineer's memo corroborate our independent conclusions set forth above. Thus, to the extent that some of our basic findings which led to our independent conclusions may arguably be based upon stringent proof of circumstances, the facts as testified to by Sims (para. 3(b)) and as reported in the engineer's memo (para. 4) translate such stringent proof of circumstances into clear unmistakable proof of Intervenors' misconduct.

139. We have also concluded at para. 14, *supra*, that when Intervenors' explanations of their conduct are viewed on the basis of the totality of this record, including the engineer's memo and Sims' testimony, their explanations are not only afterthoughts in an attempt to justify their misconduct, they are lacking in candor and constitute a pattern of deceit. In this connection, the Board emphasizes that we have reached this latter conclusion reluctantly, and only after the most careful and deliberate consideration. We also emphasize that if there were only isolated incidents of unreliable explanations, we would weigh heavily the fact that with respect to some of these unreliable explanations the passage of time could have dimmed memories. *Cf. Grenco, Inc., supra.*[75] Unfortunately, this is not the case here. There are a series of unreliable explanations where, on their face and in light of the facts and circumstances, fiction is played out constantly. Hence, even if some of these unreliable explanations were to be deemed understandable, which they are not, when they are considered collectively, there emerges an unmistakable pattern of lack of candor and deceit. Finally, we emphasize that Intervenors recognized at the outset of this proceeding that they were called upon to defend their conduct in this very proceeding, and at page 3 of Intervenors' Brief in support of exceptions, it is again restated that ". . . Intervenors have been forced to devote very substantial time, energy and funds to the defense of their 'character'. . . ." Obviously, this is not a case where Intervenors were not on notice, and in the Board's view they had a burden, at least, to come forward with good faith explanations which do not defy reason, logic, human experience and normal business practices; otherwise, they had a choice of admitting the facts and resting their defense on their legal theories. See paras. 8–12, *supra.*

THE GRENCO CRITERIA

140. We turn now to the *Grenco* criteria, and to Intervenors' interrelated novel legal arguments. In *Grenco, supra*, the Commission explained that in order to be a strike application a principal or incidental motive for its filing "must be to obstruct or delay another application", and the Commission specified as guidelines in making a determination the following: (a) the timing of the application; (b) questions con-

[75] See note 17, *supra.*

cerning a frequency study; (c) the economic and competitive benefit occurring from the application; and (d) the good faith of the applicant. The criteria will be discussed *seriatim*.

141. *The Timing of the Application:* The Sumiton application was filed approximately six weeks after the "return" of the Cullman application, and prior to the time that the Cullman application was resubmitted to the Commission in accordance with Section 1.1102(i) of the Commission's Rules. As pointed out in paras. 9–12, *supra*, when the Cullman application was "returned", it had the status of a pre-existing application which may be resubmitted, without additional payment of fees, at the will of the applicant, but subject to the provisions of Section 1.571(c) of the Commission's processing rules which establishes a cut-off date, and prescribes the last day for non-applicants to file new applications and for pre-existing applicants, whose applications have been returned, to resubmit their application. In addition, as shown by paras. 11 and 12, *supra*, when the facts and circumstances in this case relating to Intervenors' overt acts after the return of the Cullman application are considered separately and without regard to their preceding overt acts, these overt acts of instigating the completion of the Sumiton company and the Sumiton application, and of rendering substantial assistance in the completion of the application, standing alone, establish that Intervenors' overt acts constitute strike conduct. And when these overt acts are considered with those which preceded the return of the application (*i.e.*, the threat to Mitchell, and the stimulation of the Sumiton initial investors), there is a pattern of conduct established by the Intervenors that they knowingly engaged in a deliberate path of misconduct designed not only to dissuade Mitchell from further prosecuting the Cullman application prior to its return, but, in addition, to block a resubmitted Cullman 1540 kHz application if Mitchell could not be otherwise induced to abandon the resubmission of such an application. Finally, we have already pointed out at para. 12, *supra*, that Intervenors' truncated legal theory equating an application which is "returned" with one that is dismissed or withdrawn, cannot be followed without defeating the Commission's strike policy.

142. *Questions concerning a Frequency Study:* Unequivocally the record establishes that neither Intervenors, nor Sumiton, made a Sumiton frequency study to determine the availability of other frequencies. However, the record does suggest that the 1090 kHz frequency may have been available for use in Sumiton, but Bullard, nevertheless, selected the 1540 kHz frequency as the "best" frequency for Sumiton. See para. 87, *supra*.

143. In this connection, Intervenors assert that in 1965, if a purported "striker knew that there were usable, alternative frequencies available in his community [of license, *viz.* Cullman here] it would be logically implausible, at best, to conclude that any assistance he might render to a group such as . . . [Sumiton] would have hindered the establishment of a competitive station." Intervenors further contend that they knew of several alternative available frequencies for use in Cullman. First, as shown by the facts set forth at paras. 57 and 87, *supra*, this record is devoid of substantial evidence establishing that

there were, in fact, other available frequencies for Cullman; at most, there is a suggestion that the same 1090 kHz frequency which "might" have been available for Sumiton, "might" also be available for Cullman. Secondly, it is significant to note that Intervenors, again, obfuscate the facts, for it is clear that this is not a case where Intervenors merely assisted in some insubstantial manner in the preparation of the Sumiton application. *Cf. Grenco, supra.* They, in fact, instigated the Sumiton company and Sumiton application, and to argue, as Intervenors do, that this would not hinder the establishment of a competitive station in Cullman, flies in the face of the Commission's strike policy.

144. *The Economic and Competitive Benefit to Intervenors:* Surely, on the basis of what has occurred in this proceeding, there can be no question that the Sumiton 1540 kHz application has resulted in the protection of WKUL, Cullman, from additional competition. See para. 12, *supra.* What occurred here resulted—after five and one-half years—in the abandonment of the 1540 kHz Cullman application. (See note 2, *supra.*)

145. *The Good Faith of the Applicant:* As pointed out in para. 16, *supra*, there is no question that Sumiton's principals desired to construct this station; however, there is also no question that Sumiton's principals knew that one of the purposes of their application was to block a resubmitted Cullman application. See paras. 15–17, 93, 97, 99, 105 and 106, *supra.*

146. Hence, on the basis of the *Grenco* criteria, the Sumiton application is a strike application, and it must be, accordingly, denied, and Intervenors' conduct constitutes deliberate strike conduct.

THE EQUITIES, IF ANY, RELATING TO INTERVENORS' CONDUCT

147. Intervenors contend that "even if Messrs. Millar and Bullard acted improperly—and the record is abundantly clear that they took great pains to avoid doing so—there is no showing on the record that they acted in other than good faith reliance on expert opinion about existing Commission policy." As pointed out, in paras. 47, 53, 62 (note 29), 65, 78–84, 101, 104 and 130, *supra*, Intervenors' contentions here are fiction, totally unsupported by this record. In sum, the Board's detailed findings and conclusions establish that Intervenors acted in bad faith.

148. The Board is also mindful that Intervenors have tried to bring the facts of the instant case under the swing of *Asheboro Broadcasting Co.*,[76] *supra*, 20 FCC 2d at 3, where the Commission concluded (a) that the conduct there involved was strike conduct; (b) that the innocent path of the licensee showed that he followed the legal-go-ahead of his counsel although it was in error; and (c) that, on the basis of counsel's sworn testimony at the hearing relating to his understanding of

[76] Intervenors also place reliance on *WTIF, Inc.*, 1 FCC 2d 1543, 7 RR 2d 30, which is an Initial Decision of the late Judge Frederick issued in 1965. Although it is stated at note 11 of their Brief in support of exceptions that they brought this case to the Judge's attention in their Brief in support of proposed findings and there noted the similarities between this case and *WTIF*, examination of Intervenors' Brief in support of proposed findings establishes that they made passing reference, at best, to *WTIF*. Contrary to their assertions the Brief is devoid of any mention of the similarities, let alone a discussion of such alleged similarities. In any event, the *WTIF* Initial Decision became final, automatically; it cannot be deemed to constitute Commission precedent.

Commission precedent in 1960, the scales were tilted in favor of nonrevocation, even though advice of counsel cannot excuse a clear breach of duty by a licensee. This is not the case here. As shown by paras. 78–82, *supra*, counsel's testimony in the instant proceeding relates solely to his conclusionary advice without detailing his reasons. Moreover, as further shown by para. 78, *supra*, counsel here limited his legal-go-ahead to assistance "solely" in the preparation of the Sumiton application, and contrary to Intervenors' assertions, he did not give them *carte blanche* legal advice. Finally, as shown by paras. 83–85 and 92, *supra*, Intervenors failed to comply with their counsel's legal advice, and instead, on the basis of their own extraordinary knowledge, background, and experience in the radio field (paras. 34–47, *supra*), knowingly and deliberately followed a path of strike conduct.

149. It is also contended that equities should flow to the Intervenors because (a) of the time and funds they have expanded in meeting the requirement to defend themselves and their character in this proceeding, and (b) of their interrelationship now with public stockholders who own part of the stock of Airmedia. As indicated at para. 139, *supra*, we disagree with Intervenors that they were required to defend themselves by disputing the facts underlying the initial strike charges, if those basic facts were true. Stated another way, they had a choice of admitting those facts and resting their defense on their legal theories. See para. 8, *supra*. Hence, as pointed out at para. 82, *supra*, this is not a case where Intervenors' good faith is made manifest (a) by the innocence they have portrayed in blindly and openly following their counsel's alleged *carte blanche* advice, and (b) by the openness and candor with which they have admitted all of the facts concerning their conduct. For these reasons, Intervenors' plea of equity is totally without merit. Surely, there are no equities flowing from the time and money they expended in what has now been proven to be a transparent and fictional type of defense, where all of their explanations are deemed to be unreasonable or unreliable.

150. With respect to their interrelationship now with public stockholders in Airmedia, our views have been discussed at note 67, *supra*, and will not be repeated here, in detail. Suffice it to say that as shown by para. 117, *supra*, the Commission had no knowledge of Intervenors' misconduct at the time it acted upon the Airmedia-WKUL transfer on January 13, 1966, or when it acted upon the transfer of WIRA and WOVV–FM, Fort Pierce, Florida, to Airmedia on September 16, 1967. The "federal establishment", as Intervenors describe the Commission, can therefore, assume no responsibility for what has occurred in Intervenors' apparent failure to tell their stockholders of their misconduct depicted by the facts of record in this proceeding.

151. In addition, it is to be noted that with respect to Intervenors' contentions concerning the protracted period of time involved in this case, they knew, on the basis of their Huntsville application experience (paras. 39 to 42, *supra*) that when they instigated the filing of the Sumiton application, the Commission was backlogged in designating applications for hearing which accounts for the fact that approximately three years elapsed before the Sumiton and Cullman applica-

tions were designated for hearing, and the strike issue was added to this proceeding. At that time, the Commission was uniformly sending form letters [77] to applicants, in response to status inquiries, advising them that the Commission was backlogged due to an inadequacy of staff. Without overlooking the fact that the time involved in this case presents still another sorry story in the annals of delays in the administration of the Commission's business, it cannot be said, in light of Intervenors' knowledge that such a delay would occur when they instigated the Sumiton application, that the delay has resulted solely in detriment to the Intervenors. As indicated at para. 144, *supra*, their strike conduct has resulted in the protection of WKUL, Cullman, from additional competition which could have come from the 1540 kHz Cullman application. Moreover, considering the unreliability of Intervenors' explanations of their conduct, constituting their defense in this case and the choice they could have made in admitting the facts and resting their defense on their legal theories (see paras. 8–12, *supra*), the conclusion is irresistible that they are playing a game with the Commission, stalling for time while the facts of the case grow cold. To repeat, this is not a case of an inexperienced broadcaster; it is also not a case where Intervenors had no choice of admitting the facts, and appealing the Board's Memorandum Opinion and Order specifying the strike issue to the Commission, on the basis of Intervenors' position on the law. It is further not a case where a striker relied blindly and innocently on erroneous advice of legal counsel. Nor is it a case where the reliability of Intervenors' proposed findings, exceptions and briefs, demonstrate the need for (a) 120 pages of exceptions to the Initial Decision irrespective of its fundamental defects; and (b) a 67-page brief, particularly where in Intervenors' petition seeking authority to file a brief in excess of fifty (50) pages in length, it is stated that "if the Board should not feel disposed to grant this request, Intervenors suggest that that portion of the brief entitled 'Statement of the Case' (pp. 9–32) be stricken." [78] A review of pages 9–32 reveals that it constitutes Intervenors' deficient statement of the facts.

152. In short, at this juncture of this proceeding there are no equities which stem to the Intervenors resulting from the time involved in the protracted hearing processes of this case. *Cf. The Walmac Co., supra*, where the Commission excused conduct because of the protracted time factor and the lack of "bookkeeping" knowledge of that broadcaster. In contrast, we have here extraordinarily knowledgeable broadcasters with respect to Commission policies and practices, where the "time element" has resulted in benefits, as well as detriments to them.

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[77] Officially noticed. In addition, the Board has officially noticed the Commission's reply, dated February 9, 1968, to the Cullman applicant regarding the status of its then pending application. The letter, in pertinent part, reads, as follows: "Due to a backlog of applications, action on these applications [Cullman's and Sumiton's], and a considerable number of earlier-filed applications, has not been possible. Basically, the problem is one of not being able to employ and retain an adequate staff of professional employees to perform the highly specialized type of studies necessary for proper consideration of these proposals."

[78] For purposes of the record, Intervenors' petition is granted.

THE CLARITY OF THE COMMISSION'S STRIKE POLICY TO INTERVENORS AND TO BANKSON

153. At page 38 of Intervenors' Brief, it is asserted that "what constitutes a '*strike*' *issue*, to a large extent, is and always has been obscure", citing *Pressley* v. *FCC*, 141 U.S. App. D.C. 283, 437 F. 2d 716 (1970). (Emphasis supplied.) In the context of the *Pressley* case, *supra*, as well as in the context of Intervenors' contentions of their need to defend themselves and their character in this proceeding, it is evident that they knew what the strike issue was about in this proceeding. Thus, it is evident that Intervenors' contentions here are not directed to the strike issue, *per se*, but rather to what constitutes strike conduct. Admittedly, the Court in *Pressley*, *supra*, stated that it is undesirable for the Commission to leave "the parties to discover after the fact what the Commission conceives of as the permissible limits of the interest which a licensee can manifest in the application of others." *Id.* at 288, 437 F. 2d at 721. However, given the variety of forms that strike anti-competitive conduct can assume, and the impossibility, as in any body of law, of describing the infinite varieties, it is significant to note that in the instant case, Intervenors, on the basis of their own testimony (see paras. 47 and 65–66, *supra*), were knowledgeable as to the Commission's strike policy, and showed that they understood it; nevertheless, they knowingly and deliberately engaged in a path of conduct inconsistent with their knowledge and understanding. Similarly, on the basis of Bankson's testimony, there is no indication whatsoever that he understood the policy, as now asserted by Intervenors by way of erroneous legal arguments, to have included the instigation of a strike application under circumstances where Intervenors, as principals of an existing licensee, had no right to assume the delusive liberty that a "returned" application would not be refiled.

154. Accordingly, IT IS ORDERED,[79] That the application of Sumiton Broadcasting Co., Inc. (File No. BP–17108), IS DENIED.

SYLVIA D. KESSLER,
Member, Review Board,
Federal Communications Commission.

APPENDIX

EXCEPTIONS OF HUDSON MILLAR, JR., AND JAMES JERDAN BULLARD

EXCEPTIONS TO FINDINGS OF FACT

Exception No.	*Ruling*
1	Granted to the extent shown by our supplemental findings in pars. 21, 24–25, 31, 34, and 48 of this decision; denied in other respects, viz. exception No. 1(b)(4) is denied for the reasons stated in notes 4 and 21 of this decision. We find nothing in Mitchell's testimony even remotely evidencing hostility, contrary to intervenors' assertions. Other portions of this exception which have not been, in substance, adopted in this decision are denied as being without decisional significance.

[79] Intervenors' petition to file a Brief in excess of 50 pages IS GRANTED. See para. 151, *supra*.

Exception No.	*Ruling*
2	Granted, in part; denied, in part. "Findings 11 and 12" of the initial decision have not been adopted by the Board. This exception is granted to the extent reflected by our substituted findings set forth in pars. 52–53 of this decision. In other respects, the exception is denied. More specifically, that portion of exception No. 2 wherein it is contended that Millar "talked to his communications counsel about the possibility of bringing an economic injury protest" is denied for the reasons stated in par. 53 of this decision; other portions of this all-encompassing exception which have not been, in substance, adopted in the decision are denied as being argumentative, or without decisional significance.
3	Granted to the extent that we have not adopted "Finding 12" of the initial decision. Denied, in substance, with respect to Millar's contention that he did not threaten Mitchell for the reasons set forth in pars. 3(a), 5–7, 34–37, 52–53, and 137 of this decision.
4 (a), (d), (e), (f).	Granted to the extent that we have not adopted "Finding 13" of the initial decision. Denied, in all other respects, as being argumentative, and without decisional significance. See pars. 9–14, 39–42, 50 (note 28), and 135–146 of this decision.
4 (b), (c)	Granted to the extent shown by our substituted findings at par. 76 of this decision; denied, in all other respects, as argumentative or without decisional significance. See pars. 9–14 and 39–42 of this decision.
4 (g), (h), (i)	Denied as unsupported by the totality of the record, although the Board does not deem these matters to be of decisional significance. In passing, however, it is noted that: (*a*) Murphree's testimony relating to his ongoing community ascertainment efforts is unrebutted on this record, and (*b*) he stated that he had notes concerning the specific dates of contacts which were made a long time prior to the dates of the letters. (tr. 381, 389, 390, and 394.) However, intervenors' counsel did not ask him to produce the notes. In any event, it is also clear that since the identity of Cullman's community contacts were revealed in its resubmitted application (unlike Sumiton's, see note 28 of this decision), intervenors could have offered the testimony of Cullman's contacts, in rebuttal, if they believed that these persons would contradict Murphree's testimony. They did not do so.
5(a)	Granted to the extent that we have not adopted note 5 of the initial decision. Denied in other respects as argumentative. The Board does not deem Mitchell's version inherently incredible, as contended by intervenors; nor do we believe that it transcends the bounds of reasonableness despite the fact that we do not attach any decisional significance to these particular matters. We further do not deem Murphree's testimony inconsistent or inherently incredible, although we attach no decisional significance to this controversy. See pars. 9–14, 39–42, and 135–146 of the decision.
5(b)	Denied for the reasons stated in pars. 48–51 of the decision with respect to the contention that no one connected with WKUL knew about Cullman's plans prior to the time that the application was first filed with the Commission in 1965. In other respects, this exception is denied as of no decisional significance.
5 (c), (d)	Denied as of no decisional significance.

Exception No.	*Ruling*
5(e)	Granted to the extent shown by our substituted findings at pars. 78–84 of this decision. Denied in other respects as argumentative or unsupported by the record. Moreover, Millar's explanation that he made no inquiry of Mitchell concerning their plans to refile because "I don't think you probe into a man's private business with that type of question * * *" is the height of hyperbole under the circumstances of this case, where prior to this time, Millar threatened Mitchell with an economic protest.
5(f)	Granted to the extent that we have not adopted note 6 of the initial decision. Denied, in substance, as of no decisional significance. See ruling on exception No. 5(a).
6(a)	Denied as of no decisional significance.
6(b)	Denied for the reasons stated in pars. 66–68 of this decision.
7	Denied. Par. 16 of the findings of the initial decision adequately reflects the record.
8 (a), (c)	Granted to the extent that we have not adopted "Finding 17" of the initial decision. Denied, in substance, for the reasons stated in pars. 79–84 of this decision.
8 (b), (d)	Granted to the extent that we have not adopted note 9 of the initial decision, and that our substituted findings at par. 56 of this decision show that Millar considered changing WKUL's frequency prior to the return of the Cullman application. Denied, in all other respects, for the reasons stated in par. 57 of this decision.
8(e)	Denied, in substance, for the reasons stated in par. 57 of this decision.
9 (a), (b)	Granted to the extent that we have not adopted "Finding 18" of the initial decision, and have substituted our own findings at pars. 61–65 and 84 of this decision. Denied, in substance, for the reasons stated in these paragraphs.
9(c)	Denied for the reasons stated in footnote 39 of this decision.
9(d)	Denied for the reasons stated in pars. 66–68 and 89–90 of this decision.
10	Granted to the extent shown by the Board's supplemental findings at par. 22 of this decision. Denied, in other respects, as of no decisional significance.
11, 12(a), 12(b)(4), 12(b)(5), 18, 19(a), 19(b).	Granted to the extent that we have not adopted "Findings 20, 21, 26, and 27" of the initial decision, and have substituted our own findings. Denied, in substance, for the reasons stated in pars. 3(b), 6–8, and 135–139 of this decision. As shown by pars. 34–136 of this decision, intervenors' strike conduct is established by an abundance of evidence, separate and apart from Sims' testimony, and we have reached an independent adverse conclusion, without regard to Sims' testimony and the engineer's memorandum. However, Sims' testimony does corroborate all of the basic facts and circumstances which were determined on the basis of the other evidence in this record, and we have reached a second independent conclusion on the basis of the corroborative evidence derived from Sims' testimony, as well as the engineer's memorandum. We, therefore, do not deem any of the matters urged by intervenors in these exceptions to discredit Sims' testimony. In view of the other clear and convincing evidence of intervenors' strike conduct, we, however, have attached no decisional significance to the Sims-Millar disputed testimony that: (*a*) Millar told Sims that an application was being made at Cullman (exception No. 12(a)); and (*b*) Millar offered to give or to lend Sims $500 (exception Nos. 12(b)(5), 18(b)(1), and 18(b)(2)).

Exception No.	*Ruling*
12(b)(1)	Denied, in substance, with respect to the contention that Bullard did not select the 1540 kHz frequency for Sumiton, for the reasons stated in pars. 86–87 of this decision. Granted, in other respects, to the extent shown by our substituted findings at pars. 85–87 of this decision.
12(b)(2), 12(b)(3).	Granted to the extent shown by our findings in pars. 88 and 92 of this decision; denied, in all other respects, as without decisional significance.
12(c)	Denied, for the reasons stated in par. 9 of this decision.
13	Granted to the extent that we have not adopted "Finding 21" of the initial decision and have substituted our own findings. Denied, in substance, with respect to Millar's assistance to Sumiton for reasons stated in pars. 88, 131–134, and 136 of this decision, as well as par. 138, with particular regard to the facts stated in the engineer's memorandum set forth at par. 4. Denied, with respect to Sims' testimony that Millar told him "that an application on this particular frequency, if approved, would block a similar facility in Cullman, which would have meant another competitor" for the reasons set forth at pars. 3(b), 138, and 139 of this decision. As shown by the detailed facts in pars. 34–134, there is an abundance of evidence which supports Sims' testimony. It is, accordingly, patent that Sims' testimony is not inherently incredible. Denied, in all other respects, as argumentative.
14, 15(a), 15(b), 19(e), 19(f).	Granted to the extent indicated by our supplemental findings to "Findings 22 and 23" of the initial decision. See par. 4, notes 5 and 7, par. 90, note 47 of this decision. Denied, in substance, for the reasons stated in par. 138 of this decision.
15(c)	Denied, in substance, for the reasons stated in pars. 66–68, 89–93, and 106 of this decision which establish that there was no "Sumiton group" in September 1965, prior to the return of the Cullman application, and that after the return of the application, it may reasonably be said that there were behind-the-scene activities between intervenors and Chapman and/or Ballenger, sometime prior to Millar's call to Cohen; otherwise, Millar would not have known either that there was, in fact, a group, or that they were ready to proceed with the filing of an application irrespective of what the Cullman applicant did.
16(a), 16(b)	Granted to the extent shown by our supplemental findings to "Finding 24" of the initial decision. See pars. 92–98 of this decision. Denied, in all other respects, as of no decisional significance.
16(c)	Granted, in substance, as shown by pars. 99 and 100 of this decision.
17	Denied, in substance, for the reasons stated in pars. 99 and 100 of this decision, and, in other respects, because it is patently argumentative in light of the facts and circumstances in this record.
19(c)	Granted to the extent indicated by par. 100 of this decision; denied, in other respects, as of no decisional significance.
19(d)	Denied, as of no decisional significance and as argumentative. The record is clear that, without regard to the engineer's memo, either Millar or Bullard selected and/or recommended Cohen. See pars. 4, 90, and note 59 of this decision.
20	Denied for the reasons stated in pars. 101 and 104 of this decision.

Exception No.	*Ruling*
21	Granted to the extent indicated in our supplemental findings at pars. 113–116, and 123 of this decision. Denied, in other respects, and particularly with respect to exception 21(f) wherein it is contended that Bullard's help was never surreptitious or less than fully open. See pars. 82–110, and 114 of this decision.
22(a)	Denied for the reasons stated in par. 110 of this decision.
22 (b)–(d)	Granted to the extent indicated in notes 30 and 31, pars. 102, 108, 109, 118–122 of this decision; denied in all other respects, as of no decisional significance.
22(e)	Granted, in substance; see par. 43 of this decision.
23	Denied, in substance; see pars. 118–122 of this decision.
24 (a), (c)	Granted to the extent indicated by our supplemental findings at pars. 131–136 of this decision; denied, in substance, in all other respects, for the reasons stated therein.
24(b)	Granted, in substance, as shown by our supplemental findings at par. 116 of this decision.
25(a)	Granted, to the extent indicated at pars. 47 and 123 of this decision; denied in all other respects as being of no decisional significance.
25(b)	Granted to the extent indicated by our supplemental findings at par. 130 of this decision; denied, in other respects, as not supported by Bankson's testimony, or as having no decisional significance.
26, 27	Granted in part, and denied in part. See our rulings on Sumiton exception Nos. 2 and 4.
28, 29, 30	Denied. See note 21 of this decision. In addition, it is to be noted that, contrary to intervenors' assertions, this record is devoid of substantial evidence indicating that any alternative frequency was, in fact, available for Cullman. See par. 57 of this decision. Under this circumstance, all of Intervenors' arguments in these exceptions are a non sequitur.
31	Denied for the reasons stated in pars. 135–143 of this decision; obviously, all of the exceptions have no decisional significance in light of the facts set forth in pars. 9–12 and 141 of this decision. See also pars. 39–42 of this decision.
32	Denied as of no decisional significance. See ruling on exception No. 28 et al.
33(a)	Granted to the extent indicated at par. 128 of this decision; denied, in other respects, as of no decisional significance.
33 (b), (c), (d)	Denied, in substance, for the reasons detailed in pars. 68–74, 89–102, and 106 of this decision. With respect to the contention that "there is no suggestion in this record that a superior frequency was available" for Sumiton, denied for the reasons stated in pars. 86 and 87 of this decision.
33(e)	Granted to the extent shown by par. 102 of this decision; denied, in substance, in all other respects for the reasons shown therein.
33(f)	Denied, as of no decisional significance.
	EXCEPTIONS TO CONCLUSIONS
34–46	Granted to the extent that we have not adopted the conclusions of the initial decision on the strike issue, although we agree with the ultimate result that intervenors are guilty of strike conduct. Denied, in substance, and in all other respects for the reasons detailed in our decision.

EXCEPTIONS OF SUMITON BROADCASTING CO., INC.

EXCEPTIONS TO THE FINDINGS OF FACT AND CONCLUSIONS

Exception No.	*Ruling*
1	Denied for the reasons stated in pars. 131–134 of this decision.
2	Denied, in part; granted, in part. The initial decision adequately reflects all of the significant facts, except the testimony of Paul Brown which corroborates the testimony of Ballenger that Fowler stated "[w]ell, when he comes, I am getting tired, I don't want to waste my vacation fooling around. Just go ahead and sign what is necessary for me and you take over." (tr. 1112.) Accordingly, the findings of fact are modified to include these salient facts.
3, 5	Denied, as of no decisional significance under the circumstances of this proceeding.
4	Granted, in substance.
6	Denied, for the reasons stated in this decision.

FCC 72D-36

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SUMITON BROADCASTING CO., INC., SUMITON, ALA. For Construction Permit	Docket No. 18204 File No. BP-17108

APPEARANCES

Ray R. Paul and *John Gordon Smith* (Prince & Paul) on behalf of Sumiton Broadcasting Co., Inc.; *Edward P. Taptich* (Wilner, Scheiner & Greeley) on behalf of Cullman Music Broadcasting Company; *Rainer K. Kraus* and *Arthur B. Goodkind* (Koteen & Burt) on behalf of Hudson Millar, Jr. and James Jerdan Bullard, Intervenors; and *Jay L. Witkin* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER CHARLES J. FREDERICK

(Issued May 24, 1972; Released May 26, 1972)

PRELIMINARY STATEMENT

1. This proceeding originally concerned the mutually exclusive applications of Sumiton Broadcast Co., Inc. (hereinafter Sumiton) in Sumiton, Alabama, and Dan Cole Mitchell and Leon A. Murphree, d/b as Cullman Music Broadcasting Company (hereinafter Cullman) in Cullman, Alabama.[1] In its Memorandum Opinion and Order, FCC 68-576, released June 4, 1968, the Commission designated these applications for hearing on the following issues:

(1) To determine the areas and populations which would receive primary service from the proposed operations and the availability of other primary service to such areas and populations.

(2) To determine with respect to the application of Sumiton Broadcasting Co., Inc.: (a) Whether its four stockholders are willing to become personally liable for the repayment of a prospective $65,000 bank loan; (b) Whether, in the light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

(3) To determine with respect to the application of Cullman Music Broadcasting Company: (a) Whether Leon A. Murphree has sufficient liquid assets to meet his $5,000 commitment. (b) Whether a bank loan is available to the applicant, and, if so, the amount of the loan, the terms of repayment, and the security

[1] These cities appear to be 40-50 miles apart.

required. (c) Whether, in light of the evidence adduced pursuant to (a) and (b) above, the applicant is financially qualified.

(4) To determine the efforts made by the applicants to ascertain the community needs and interests of the areas to be served and the means by which they propose to meet those needs and interests.

(5) To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

(6) To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if either, of the applications should be granted.

2. In its Memorandum Opinion and Order, FCC 68R–505, released December 6, 1968, the Review Board added the following issue in response to a petition to enlarge issues filed by Cullman:

To determine whether the application of Sumiton Broadcasting Co., Inc., was filed for the principal or incidental purpose of obstructing or delaying the establishment of a standard broadcast facility at Cullman, Alabama, and whether, in light of the facts adduced, a grant of the application of Sumiton Broadcasting Co., Inc., would serve the public interest, convenience, and necessity.

The burden of proceeding with the introduction of evidence under this issue was placed on Cullman, while the burden of proof was placed on Sumiton. In addition, the Board made Hudson C. Millar, Jr. and James Jerdan Bullard parties to this proceeding solely with respect to this issue.[2]

3. In a Memorandum Opinion and Order, FCC 69R–241, released May 26, 1969, the Board added the following issue:

To determine whether the proposal of Cullman Music Broadcasting Company, Inc. is in compliance with Section 73.37 of the Commission's Rules with respect to overlap and, if not, whether unusual facts exist which would warrant a waiver of said section.

The burden of proceeding and the burden of proof under this issue were placed on Cullman.[3]

4. On June 6, 1969, Sumiton and Cullman filed a joint request for approval of agreement which sought dismissal of the Cullman application. In a Memorandum Opinion adopted November 5, 1969, the Board denied the joint petition. The Board held that the public interest is not served by approval of a dismissal agreement *until* such time as the strike issue directed against the remaining applicant, Sumiton, had been resolved.

5. On December 1, 1969, in response to a petition to enlarge, the Board added the following issues:

(1) To determine, with respect to an "Affidavit" dated August 3, 1968, and filed with the Commission on August 8, 1968, by Sumiton Broadcasting Company and purportedly signed "John Logan

[2] As noted *infra*, Cullman defaulted in the prosecution of its application. As a result, the Broadcast Bureau assumed the burden of proceeding under the "strike" issue.

[3] Millar and Bullard, on December 17, 1968, filed a petition for expanded participation. The Examiner granted this petition in his Memorandum Opinion and Order released January 22, 1969.

Fowler"; (a) The facts and circumstances surrounding the preparation, execution and filing of said affidavit. (b) Whether such affidavit was filed with the knowledge and consent of John Logan Fowler. (c) Whether said affidavit contains false representations concerning the knowledge and belief of John Logan Forbes. (d) Whether, in the light of the evidence adduced under the foregoing, Sumiton Broadcasting Company, Inc. possesses the requisite qualifications to be a licensee of the Commission.

(2) To determine whether Sumiton Broadcasting Company has failed to report material changes in its application as required by Section 1.65 of the Commission's Rules; and if so, the effect thereof upon its basic and comparative qualifications to be a Commission licensee;

In the same order, the Board also revised Issue 2(a) in this proceeding to read, in full, as follows:

> To determine *whether the present Sumiton stockholders are willing to become personally liable for the repayment of a prospective $65,000 bank loan, and, if so, whether securing the personal endorsements of the stockholders will meet the conditions necessary to assure the availability of said bank loan.* (Examiner's underlining.)

The burden of proceeding with the introduction of evidence under the new issues added (but not the revised issue) was placed on the Broadcast Bureau, and the burden of proof on Sumiton.

6. Prehearing conferences were held on the following dates: July 26, October 9, November 1, December 6, and December 17, 1968; January 14, March 25, May 29, June 6, June 24, September 3, October 1, and November 21, 1969; and May 5, 1971. Hearings were held on December 8–12, 1969; March 18–19, 1970, and July 13, 1971. The record was closed on July 13, 1971. On October 18, 1971 the record was reopened to receive Intervenors' Exhibits 5 and 6 and was reclosed on the same date.

7. The following witnesses testified at the hearing: Dan Cole Mitchell, partner, Cullman Music Broadcasting Co.; Leon A. Murphree, partner, Cullman Music Broadcasting Co., salesman, announcer, WFMH; John Logan Fowler, former stockholder, secretary, Sumiton Broadcasting Co.; Thomas Wayne Sims, advertising manager, Top Dollar Stores, Jasper, Alabama; Cecil Freeman Ballenger, vice-president, director, Sumiton Broadcasting Co.; Hudson Millar, officer and director of Air Media, Inc., which owns Cullman Broadcasting Co., licensee of WKUL, Cullman, Alabama; James Jerdan Bullard, manager of WKUL, Cullman, Alabama; Arthur W. Bachmann, engineer, WKUL; Herman W. Maddox, mayor, Jasper, Alabama; Jerry C. Chapman, stockholder, Sumiton Broadcasting Co.; Jerry Dupree, resident, Jasper, Alabama; Paul Brown, employee, B & F Lumber Company; Mrs. Katherine Millar (Mrs. Hudson Millar), employee of WIRA, Ft. Pierce, Florida; John P. Bankson, Jr., attorney; Julius Cohen, consulting engineer.

8. By virtue of the dismissal of the Cullman applicaton,[4] the following issues have been rendered moot: the areas and population and 307 (b) issues; and the financial, *Suburban*, and Section 73.37 issues designated against Cullman. Insofar as the *Suburban* issue against Sumiton is concerned, it is concluded that this applicant has sustained its burden under the issue.

Findings of Fact

"Strike" issue

9. Cullman Music Broadcasting Company, an Alabama partnership, was formed in the spring of 1965 for the purpose of establishing a new broadcast facility in Cullman, Alabama. Cullman had a 1960 population of 10,883 persons. Its 1970 population was 12,601. AM service in 1965 included WKUL, 1340 kHz, 1 kw day, 250 w night (Class IV), and WFMH, 1460 kHz, 5 kw day, 500 w night (Class III). FM service included WFMH–FM (Class C). Official notice of Commission's files granted. The partners in the venture were Dan Cole Mitchell and Leon A. Murphree. On May 26, 1965, the partners filed an application with the Commission for a construction permit to operate on 1540 kHz in Cullman.

10. Soon after publication of the filing of the application in the town's local newspaper in June 1965, Mitchell received a telephone call from Hudson Millar, in which Millar stated that he wished to discuss the Cullman application. Millar, at the time, was sole owner and general manager of WKUL, an AM facility operating in Cullman. The two men knew each other at the time in connection with radio advertising which Mitchell had purchased on WKUL.

11. At 2 or 3 o'clock during the afternoon in question, Millar came down to Mitchell's automobile dealership for the purpose of discussing the venture. At this meeting, Millar attempted to enlighten Mitchell on the problems of getting a radio station, such as the length of time involved and the expense. WKUL was operated by Millar as a sole proprietorship for several years (1951–59). He then incorporated as Cullman Broadcasting Company, Inc. In June 1965, he was Cullman's sole stockholder. At the same time, he told Mitchell that if he were interested, he could purchase stock in a company to be called Air Media, Inc., which Millar was then forming. In the alternative, Millar offered to sell him WKUL.

12. In response, Mitchell informed Millar that he and Murphree were not interested in the Air Media stock at the present time. He also stated that he thought they could get into the radio business more easily by application than by buying an existing station. At this point, Millar became upset and informed Mitchell, as he walked out the door, that he would make the venture cost a minimum of $30,000 and five or six years of hard work before the partners were through. However, Millar gave no further explanation as to what he might do.

[4] The Examiner dismissed the application of Cullman Music with prejudice on July 13, 1971. See FCC 71M–1160, released July 15, 1971.

13. The Cullman application was returned by the Commission on November 18, 1965 because of engineering problems. Upon receipt, the partners sought to find another site location to correct the engineering deficiencies. Within a week, they were successful. At this time, they took the application to their engineer to fill out the necessary forms, and hired an attorney. In addition, Murphree took further surveys in connection with Section IV of the application. The application was then refiled with the Commission on April 14, 1966.[5]

14. Hudson Millar first learned about the filing of the Cullman application on May 26, 1965 from his Washington counsel, John Bankson. He discussed the possibility of bringing an economic injury protest against the Cullman applicant with his counsel. Millar also studied the Cullman application, and found deficiencies which he wrote about to his attorney. First, he thought that Mitchell would not have the time to run a station in addition to running an automobile dealership. Second, he felt that Murphree did not have sufficient funds, and that this created problems with their proposed financial plan. Finally, although he is not an engineer, Millar thought there would be interference with the Moulton, Alabama station on the basis of 1965 measurements made by his chief engineer.[6]

15. After the filing of the Cullman application, Millar also discussed the matter with James Jerdan Bullard.[7] He informed Bullard of his conversation with his attorney, as well as his own thoughts about an "economic injury protest." Although he is not an engineer,[8] Bullard conducted his own frequency search for Cullman, Alabama in July 1965. Finally, Millar and Bullard contacted Julius Cohen and asked him what frequencies appeared to be available for use in Cullman in order to decide if they could improve WKUL's facilities. After receiving Cohen's report, they decided not to apply for a change in facilities for WKUL because they already had a full-time Class IV facility. Cohen's report showed that five or six frequencies were available for use in Cullman. About half required directional antennas. The best in Bullard's judgment was 1090, which could have used 1,000 nondirectional.

16. In the meantime, Millar also called on persons who had filed letters with the Cullman application These letters from Cullman citizens contained, *inter alia*, statements on the economic growth of this

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[5] In the period between November 18, 1965 and April 14, 1966, the Cullman applicants also had conversations with numerous persons in the community concerning their intent to refile and correct engineering deficiencies. During this period, Miss Katherine Knighten, an employee of WKUL's sales department (and, later, Hudson Millar's wife), made regular trips once or twice per week to Mitchell Motors in connection with Mitchell's account, which was the station's largest at that time. Mitchell testified tha Miss Knighten invariably asked him how the station was coming along, and he, in turn, kept her up-to-date on their progress. In addition, after the application was returned, Murphree discussed new transmitter sites with Arthur Bachmann, WKUL's chief engineer.

[6] In the summer of 1965, Millar asked the opinion of his chief engineer at WKUL, Arthur Bachmann, as to whether 1540 kHz could be utilized in Cullman. Bachmann conducted field strength measurements in July or August of that summer for 1540, as well as for 1530 kHz, in Moulton, Alabama.

[7] Bullard is a shareholder and director of Air Media, Inc., along with Millar. Air Media is a Delaware holding company incorporated in November 1965. It holds 100% of the stock in Indian River Broadcasting Co., licensee of WIRA and WOBB, Fort Pierce, Florida, and Cullman Broadcasting Company, Inc., licensee of WKUL. Bullard is also currently general manager of WKUL. In November 1965, Bullard was self-employed, with income derived mainly from the sale of advertising on revolving clocks located in various places in Cullman. At the same time, he was involved in the organization of Air Media.

[8] Bullard holds an FCC third class restricted permit.

market. Millar called on a Mr. Buettner (because Buettner had stated in his letter that he wanted to buy advertising) for the purpose of soliciting his business. He also visited Probate Judge Guy Hart because he felt that Hart had misstated the growth of the county area. During this conversation, Millar told Hart that he had discussed an economic injury case with his lawyer, and that they

> would appreciate it if he would change his letter for the record . . . I told him that we would undoubtedly want him to appear as a witness, and I would hate for him to have a misstatement of facts which could have been proven in his letter. And he agreed that he would, and he changed his letter. . . .

As a result, Hart sent a new letter to the Commission. Finally, Millar visited Calvin Best of the Board of Revenue to tell him that he thought there were "misfacts" in his letter.

17. On November 26, 1965, Millar learned that the Cullman application had been returned by the Commission. He then contacted his counsel to find out whether he could use the frequency himself, or, in the alternative, give assistance to anybody else who might want to use the frequency.[9] The attorney advised Millar that he might well be risking charges of a strike issue, even though it was his opinion that Millar's assistance was legal.

18. In addition, after learning of the return of the Cullman application, Millar and Bullard discussed the use of 1540 kHz in Birmingham with 500 watts. Moreover, Millar and Bullard discussed Sumiton for their own use, but concluded that it was too small. Then, once they decided not to use the frequency at Sumiton themselves because it was too small, Bullard informed Millar that there was a group in the Walker County area interested in obtaining a station in Sumiton. Bullard mentioned Wayne Sims, Dr. Jerry Chapman and Cecil F. Ballenger. Of these, Millar knew only Sims.

19. On or about November 29, 1965, Millar and Bullard contacted Wayne Sims, advertising director of Top Dollar Stores in Jasper, Alabama, by telephone from Bullard's apartment. Sims had known Bullard since they had both been employed at WARF, Jasper, which was then owned by Millar. At Millar's suggestion, a meeting was held at Bullard's apartment in Jasper.

20. At the meeting, Millar inquired as to whether Sims would be interested in having a part of a radio station which his research had shown to be available in Sumiton, Alabama. Millar also commented that an application was being made in Cullman at the same time. They showed Sims the report that Julius Cohen had prepared that summer for Cullman, as well as a frequency breakdown which Bullard had himself prepared for Sumiton. Bullard, in turn, recommended that 1540 kHz was the best frequency for Sumiton. Millar then suggested that if Sims were willing to go into the venture as an advisor and coordinator, $2,500 would be the initial amount of capital necessary

[9] Millar stated that he did not know at that time whether the Cullman applicants would refile. However, he never asked either Mitchell or Murphree if they intended to refile because "he did not think you probe into a man's private business with that type of question . . ." Millar also stated that he thought that if they did refile, it would be for another frequency because the Commission had opened up other frequencies at that time. He stated that it was for this reason he had considered changing WKUL's frequency and had asked his consulting engineer, Julius Cohen, to make a study of available frequencies in Cullman at that time.

to set up the corporation. He also suggested that Sims get two other people to go in with him, with each putting up $1,000 and Sims putting up the other $500. Indeed, Sims testified that it was his understanding that Millar himself offered to put Sims' $500 share in return for Sims' services.

21. Millar's participation was to involve getting all research and paper work done for the application, but he was not to be a part of the organization. Millar told Sims that an application on this particular frequency, if approved, would block a similar facility in Cullman, which would have meant another competitor. Sims was elated by the offer because he thought he would have a chance to obtain a radio station.

22. On or about December 1, 1965, Millar once again called Julius Cohen. Cohen's files reveal the following office memorandum concerning that conversation:

> Re: WKUL
> 11/30/65
> Millar asked that we proceed with the preparation of the application for 1540 KC in Sumiton, Alabama. Mr. Millar will not be the principal. There are a group of four or five who are filing this application. Millar asks that we proceed. We will get site information such as photos and property sketches, business and industrial areas within the community and so forth. It is desirable to get the application filed before the prior Cullman applicant refiles an application that had been returned. In any event, the Sumiton group has been considering this frequency for many months and will proceed regardless of what action the Cullman applicant may make.

23. Cohen testified that this memorandum does not describe the events as they actually happened. He blamed the "errors" on his failure to proofread it. He stated that Millar did not give any order to proceed with the work at the time he brought the Sumiton group to Cohen's attention. Cohen also stated that he himself suggested that the application be filed before the prior Cullman application was refiled, and that Millar did not advise him that a Cullman applicant was preparing to file on 1540 kHz. Cohen explained that what the memo really indicates is that a number of potential people might be interested in that frequency. Nevertheless, Cohen conceded that it was Millar who told him that a Sumiton group had been considering the frequency for many months, and that there was possibly some discussion in the telephone conversation as to the refiling of the Cullman application.

24. During the first week of December 1965, Sims began contacting potential principals for the Sumiton application. As a result of the meeting with Millar and Bullard, at which Dr. Jerry Chapman's name was suggested, Sims went to Chapman to discuss the proposition. He received a favorable response. Later that month, a few days before Christmas, Sims also contacted Freeman Ballenger at Chapman's suggestion. Sims did not know Ballenger. It was to be the only time he met Ballenger, Ballenger, Chapman and Sims then held discussions on financial arrangements but little was done toward implementation of an application except to look at possible transmitter sites. No further meetings among these three men were held.

25. Shortly thereafter, Sims informed Bullard that he no longer had the time for the venture, and that he wished to drop out. He also told

this to Chapman. As a possible substitute, the name of J. L. Sartain was raised. Sims did not recall who made the suggestion. Sims then called Sartain, and referred Sartain on to Chapman.

26. During his participation, Sims did not tell Chapman or Sartain that they could expect help from Millar and Bullard with respect to the engineering. Nor did Sims tell Chapman, Ballenger or John Fowler (Ballenger's business partner in B & F Lumber Company) about Millar and Bullard because he assumed the application was going to be filed, and because Millar had asked him to be "doubly sure" they kept it quiet. Sims stated that he tried to protect Millar's end of it so that the application could be filed and Millar could "feel free" to give him the $500. However, after his conversation with Sartain, Sims was no longer associated with the application.

27. Sims did not receive nor ask for the $500 from Millar during the period of his participation, although he did have several telephone conversations with Millar. He also conversed with Bullard a couple of times, at least once in person. During these conversations, Millar and Bullard did not suggest the name of an engineer, but stated that their engineer would take care of preparation of the pertinent parts of the application. They also told Sims that their engineer was pushing them to get information on the transmitter site location.

28. In late December, 1965, Bullard stopped in at Ballenger's lumber company in order to sell him a spot on his advertising clocks. By this time, Ballenger had already met with Sartain concerning the proposed Sumiton application. Since Ballenger was now aware that a formal application would be necessary in order to request the radio station, and that Sartain would need help in preparing it, he asked Bullard if he had any experience in filing one. When Bullard agreed to help, Ballenger then contacted Sartain to so inform him.

29. During this meeting, Bullard also told Ballenger that the filing of an application would necessitate hiring an engineer. Bullard mentioned Julius Cohen in response to an inquiry from Ballenger as to a possible engineer; however, it is not certain whether the name was brought up at this meeting or later.

30. Bullard and Sartain began preparing the application shortly thereafter. In addition, Bullard, Fowler and Ballenger took a trip to Sumiton for the purpose of looking at prospective tower sites. Finally, at a general meeting of the principals held on January 3, 1966, officers were elected and additional material for the application concerning legal qualifications was discussed. This January 3 meeting also marked the first time Jerry Chapman became aware that Bullard was helping in the preparation of the application. The Sumiton Broadcasting Company articles of incorporation were filed on January 7, 1966.

31. Ballenger and Bullard first discussed Bullard's compensation during their meeting at the lumber company. Millar and Bullard had decided between themselves previously that Bullard, and not Hudson Millar and Associates, would receive a fee for the work. At that time, Ballenger asked directly how much Bullard would charge for his services. Bullard responded that this would depend on how long the job would take. Eventually, Bullard was paid a total of $360, of which Ballenger and Fowler contributed $240. However, Bullard was not

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paid directly in cash for his services, but instead by Ballenger and Fowler taking advertisements on Bullard's advertising clocks. They paid with Ballenger's personal check of $240. The remaining $120 was paid in advertising bought by Chapman on behalf of La Petite Beauty Salon.

32. Out of Ballenger's personal check for $240, $120 was for B & F Lumber Company advertising. This sum purchased three advertisements at $40.00 each, or $1.00 more per ad than the $39.00 charge which Bullard usually made for the ads. In addition, the other $120 paid by Ballenger's personal check purchased ads for the Sumiton Gas Company in which both he and Fowler had an interest. Ballenger stated that this type of trading of services in exchange for advertising was customary in business in this area.

33. In the meantime, the engineering portion of the Sumiton application was prepared by Julius Cohen. He was first retained by the Sumiton principals following a phone call by Sartain in late December 1965 or early January 1966. A later call from Ballenger was the only other call he received from a principal of this applicant. Although Cohen believes that Sumiton paid for his services, he did not actually see the check for payment and so he did not know who the payor was. Cohen's office records show, however, that Sumiton was billed for work done on December 1, 10 and 29, 1965.[10]

34. The Sumiton application was filed with the Commission on January 24, 1966. Subsequently, on June 21, 1968, Mitchell called Bullard on the telephone and asked him if he had had a role in the preparation of the Sumiton application. Mitchell testified that Bullard responded that he had put the whole thing together.[11] Bullard's name, however, does not appear in the application as a person assisting in the preparation of the application.[12]

"Forged Affidavit," section 1.65, and financial issues

35. John Logan Fowler is a former shareholder and secretary of Sumiton Broadcasting Company. He became associated with the application through Freeman Ballenger, his former business partner in B & F Lumber Company.

36. The following affidavit, dated August 3, 1968, and filed by Sumiton with the Commission on August 8, 1968, which purportedly bears Fowler's signature, was not in fact signed by him:

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[10] The fact that Sumiton was billed for work done prior to this actual retention of his services was explained by Cohen. He stated that in the case of recommendations of new clients, it was customary for his office to do administrative work at the outset so that the engineer could discuss the prospective client's needs intelligently. Rather than billing the person making the recommendation, Cohen's company would either absorb these costs or bill the new client later. In this case, the administrative work was billed to Sumiton Broadcasting Company.

[11] However, according to Sartain, who worked on the application with Bullard, the two of them worked an average of about eight hours per day for ten days preparing the application. Moreover, Bullard testified that he did not tell Mitchell that he had prepared the whole thing. According to Bullard, he told Mitchell that he was not instrumental in the preparation of the application but did render clerical assistance.

[12] Sartain, who signed the application, stated that he believes that the application should show only the name of the person "under whose direction" it was prepared. Since Sartain was in charge, only his name appeared.

Exhibit 4.—AFFIDAVIT

1. My name is JOHN LOGAN FOWLER. I am the Secretary, Director and stockholder of Sumiton Broadcasting Company, Inc., an applicant seeking a permit for a new standard broadcast station at Sumiton, Alabama to operate on 1540 kilocycles.

2. I am a business associate of C. F. Ballenger and was invited by Mr. Ballenger in December, 1965 to join in organizing Sumiton Broadcasting Company for the purpose of filing an application with FCC for the radio station in Sumiton. As a partner in B & F Lumber Company at Sumiton, I spend all of my time in the operation of that business along with Mr. Ballenger.

3. I have read the affidavit of Thomas Wayne Sims dated June 20, 1968. Prior to December, 1965, I neither knew Mr. Sims nor had ever seen Mr. Sims as a person whom I personally knew or recognized. During the latter part of November or early part of December, 1965, Dr. Chapman and a gentleman who was later identified to me as being Mr. Sims came to the offices of B & F Lumber Company for a conference with Mr. Ballenger. I was told by Mr. Ballenger that the purpose of this conference was to discuss the possibility of organizing a group to file an application for a radio station in Sumiton. I was aware that Mr. Ballenger had been interested in getting a radio station for Sumiton since 1961 or 1962. I have not seen Mr. Sims since that time nor have I ever talked with him on the telephone or had any communication with him directly or indirectly.

4. I have known Jerdan Bullard for several years prior to December 1965. I knew him during his tenure of employment as manager at WARF. At the time Sumiton Broadcasting Company hired Mr. Bullard to assist in the preparation of the application, I did not know Mr. Bullard was associated directly or indirectly with Hudson Millar, Station WKUL or a Corporation called Airmedia, Inc. Mr. Bullard never told me nor did I hear him tell any of the stockholders of Sumiton Broadcasting Company in my presence that he had any meeting with Wayne Sims as claimed in his affidavit.

5. I did not participate actively in the initial organization of the Company, however, I did participate in the policies of the Corporation and the proposal set forth in the application.

6. I used my personal funds for the purpose of purchasing stock in Sumiton Broadcasting Company and advertising funds to Sumiton Broadcasting Company. I have received no consideration directly or indirectly from anyone pertaining to the activities of Sumiton Broadcasting Company. As an officer and director of Sumiton Broadcasting Company I can certify that this Corporation has not received any consideration or services in connection with the preparation, and filing of the application. All expenses incurred in the preparation, filing and prosecution of the application has been paid by the Corporation with the exception of the services rendered by Jerdan Bullard who was paid directly by Dr. Chapman, Ballenger and myself through the purchase of advertising on advertising clocks.

37. *Fowler's "signature" on the above affidavit was actually placed there by Freeman Ballenger. Fowler first saw the affidavit when Freeman Ballenger showed it to him two or three days before a scheduled hearing in Cullman. Fowler told Ballenger that he was not concerned about the fact that the signature on the affidavit was not his, but was concerned because there were three or four factual inaccuracies. Moreover, Fowler also recalled that after he had made the third of three unsuccessful trips back from his vacation in order to see Sumiton's counsel about signing certain affidavits, Ballenger told him, "Everything's took care of. We didn't need you." To this, Fowler replied, "I was here. Why wasn't I in on it?"* (Italic supplied.) Ballenger, on the other hand, testified that Sumiton's counsel was inordinately delayed in bringing the affidavits to him and Fowler for their signatures. Ballenger contends that when the delay continued, Fowler told him he was not going to waste his vacation and that he should sign it himself.

Paul Brown, an employee at B & F, testified that Fowler was vacationing 30 miles away at the time and that he continually called to see if the lawyer had arrived. Finally, Brown stated, that Fowler told Ballenger in his presence the following: "Well, when he comes, I am getting tired, I don't want to waste my vacation fooling around. Just go ahead and sign what is necessary for me and you take over."

38. The following affidavit (dated August 13, 1969) contains Fowler's actual comments to Ballenger concerning the truth or falsity of the August 3, 1968 affidavit:

"My name is John Logan Fowler. Until April 18, 1969 I was a secretary, director, and stockholder of Sumiton Broadcasting Co.

Sometime just before there was to be a hearing, Mr. Ballenger showed me a copy of an affidavit sworn to, on August 3, 1968. This affidavit appears to be signed by me, but it is not my signature. I had not read the affidavit before this time and I did not know he had ever been interested in a station in 1961 or 62. I also told him I did not know anything about the clock advertising. I did not know the clock advertising was to be for payment for Mr. Bullard's part in the filing. (Ballenger, however, testified that he fully informed Fowler about payment to Bullard for the clock advertisements, and that Fowler knew Bullard was not working for nothing.) I did not know Bullard at the time he was Manager at WARF.

Mr. Bullard's and his attorney, Mr. Sartain and Ray Paul came to my house Saturday morning, July 19, 1969, for a conference concerning the radio station. Mr. Bullard's attorney, Mr. Sartain, and Ray Paul came back the same Saturday night with an affidavit for me to sign. *I didn't sign it because it wasn't as I recall the facts.* (Italic supplied.)

I have never at anytime given anybody authority to sign my name."

39. With respect to the possibly forged affidavit,[13] Chapman testified that he did not think that Ballenger had done anything wrong except "technically" because all Ballenger had wanted to do was take care of the affidavits.[14] He further stated that Ballenger's employee Brown had told him that he had heard Fowler tell Ballenger to sign the affidavit because he was going back to the lake. However, Chapman did not learn that the affidavit had been "forged" until Ballenger told him about Fowler's second affidavit when he (Chapman) called Ballenger from Texas.

40. Sartain also testified that he did not have any prior information about the first Fowler affidavit. He also stated that Fowler never told him that either the affidavit or his signature had been "forged." Sartain did not learn about the affidavit until counsel informed him of Fowler's letter to the Commission.

41. Fowler wrote a letter to the Commission on June 19, 1969, in which he stated that he and Sartain were no longer with the company, and that they had been forced out. Fowler wrote the letter because of events which occurred at a meeting of the share-holders held about two months earlier. At the meeting, Fowler heard Chapman tell Sartain that he would have to get up his part of the $7,500, if not more. Sartain responded that he had a daughter in college and that he did not know

[13] The verb "forge" is a fierce and highly incriminating one. When used herein, unless in conclusions, it is meant only in an accusatory, not final, sense. The accusation is from a party, not the Hearing Examiner.

[14] In this context, Chapman stated that he would have been willing to have Ballenger remain as a principal in Sumiton despite the issue.

where the money would come from. Chapman apparently set a date by which Sartain would have to raise the money.

42. The need for additional money resulted both from the cost of the anticipated dismissal agreement for which Cullman Music wanted $15,000 and from the fact that the prosecution of the application became more expensive than was anticipated. Chapman spoke to Ballenger and Fowler about raiding the additional money in meetings held at B & F Lumber Company. At the time Ballenger, Fowler and Chapman had met in April 1969 about $3,000 in additional expenses (such as legal fees) were required and, therefore, Ballenger and Chapman wanted Sartain to pay his 25% shareholder commitment. About six weeks later, Sartain brought Chapman his stock because he could not raise additional money. Nevertheless, Sartain stayed in the corporation even though Chapman retained his stock. They agreed that if they received the permit, Sartain would reimburse Chapman. The stock from Sartain was then endorsed in blank and given to Chapman.

43. A few days later, Fowler heard Chapman tell Ballenger "Well, I have got his stock in my pocket." The next day, Fowler told Ballenger that he did not think it was right to force Sartian out. Ballenger and Chapman soon met again at the lumber company. After talking for a few minutes, they called Fowler in and asked him if he "wanted out." When Fowler answered affirmatively, Ballenger offered to take Fowler's shares, a procedure to which Fowler agreed. He then resigned from the corporation and sold his securities to Ballenger on April 3, 1969 for $500.00. Also, at about the same time, the B & F Lumber Company partnership was dissolved.

44. After Fowler's resignation, Ballenger reached the vice-president of the Sumiton Bank for the purpose of reporting this development. The bank was to lend the applicant $65,000. Ballenger was told by the bank's vice-president that the resignation would have no effect on the bank's letter of commitment since it had been given on the strength of Ballenger's signature.[15] No further letter confirming its intent to lend the money was given by the bank. Instead, Ballenger was told that the bank was approaching its loan ceiling and, therefore, the loan commitment was in jeopardy.

45. The remaining principals in the applicant, Sartain and Chapman, approached Ballenger concerning his resignation after Fowler's letter to the Commission was brought to their attention by their attorney. At that point, Ballenger agreed to get out, but also said he would wait until Sumiton's counsel rendered an opinion on the advisability of this procedure. On October 11, 1969, Ballenger accepted the group's offer to resign, but did not surrender his stock until the last week in November of that year.

46. On December 3, 1969, Sumiton filed a petition for leave to amend in the above proceeding. The amendment disclosed the withdrawal of both Fowler (on April 18, 1969) and Ballenger. It also disclosed realignment of the stock to reflect a 33⅓% ownership each on the part of Chapman, Sartain and Dr. George W. Posey III, the latter being a

[15] A letter dated October 13, 1967 from the bank vice-president (O. Brannon Cochran) had conditioned the loan on the balance sheets of Sumiton's stockholders. A second letter of August 2, 1968 confirmed the commitment.

new stockholder. According to Chapman, the amendment was not filed earlier because of money problems and because they had been trying to get a suitable substitute for Fowler.

Financial issue

47. Sumiton estimates its cost of construction and first year operation as follows:

Downpayment on equipment	$4,430
Land	1,000
Building	2,000
Miscellaneous	5,000
1st-year cost of operation	35,000
Amortization of long-term liabilities and interest:	
Gates	5,250
Other	0
Total	52,680

To meet these costs, the applicant originally relied on the following sources of funds:

Existing capital	$3,000
Long-term loans	65,000
Total	68,000

However, on November 28, 1969, J. L. Sartain was advised by Julius S. Pilgrien, president of the Sumiton Bank, that the request for a $65,000 loan could not be granted because of the bank's reserve requirements. The applicant thus revised its plan to raise the $65,000 as follows:

Walker County Bank	$25,000
Loan from Posey	40,000
Total	65,000

48. The applicant now relies on a bank letter from the Walker County Bank dated December 19, 1969. According to W. B. Curry, vice-president, the bank is willing to lend Sumiton $25,000. The loan is to be repayable in five annual installments at the prevailing rate of prime interest and is to be personally endorsed by the stockholders, Jerry Chapman, Dr. Posey, and J. L. Sartain. The first installment is to be paid thirteen months from the date of the loan. The loan is conditioned upon the Sumiton stockholders maintaining satisfactory balances and current financial statements.

49. In a letter dated December 20, 1969, J. L. Sartain, J. C. Chapman, and Posey certify that in order to secure the loan from the bank they will personally endorse the note and pledge their stock to the bank as security for the loan.

50. The applicant also has submitted a letter dated December 20, 1969, in which Dr. Posey states that he will lend the corporation up to $40,000 for the construction and operation of the station. The loan is to be evidenced by a promissory note executed by the corporation and is to bear interest current at the time the loan is made, although no security or collateral is to be required. In addition, the loan is to be repaid in five annual installments, with the first installment of principal and interest due eighteen months from the date of the loan.

51. Dr. Posey's balance sheet of December 1, 1969 was as follows:

Assets:		
Cash in bank (checking)		$1,550
Cash in bank (savings):		
Jefferson Federal Savings & Loan	$17,000	
1st Federal Savings & Loan	3,000	
		20,000
U.S. Government securities		45,000
Stock-ready salable over counter		2,000
Cash value of life insurance		7,000
Office equipment		8,000
Farm equipment and stock		32,000
Real estate (100 percent individually owned)		150,000
Interest in office building (¼)		31,000
Interest in 5 residential buildings (½)		32,000
Interest in La Petite Beauty Salon		8,000
Total assets		336,550
Liabilities:		
Miscellaneous expenses (not in excess of)		500
Current payments of notes (within 12 months)		3,000
Mortgage note (long-term)	$15,000	
Less current portion	1,950	13,050
Mortgage note (long-term)	9,000	
Less current portion	1,050	7,950
Total liabilities		24,500
Net worth		312,050
Total liabilities [1] and net worth		336,550

[1] There are also contingent liabilities. Dr. Posey has, by accommodation, endorsed a long-term note in the amount of $15,000, payable in monthly installments of $310. This note, which is several years old, is fully secured and payments have been properly paid on the due dates. The income of Posey during the past 2 years (at the time of the exhibit) has been in excess of $20,000. (Sumiton exhibit 10, p. 7.)

Conclusions of Law

1. In its recent Memorandum Opinion and Order in *Grenco, Inc.*, 28 FCC 2d 166 (1971), the Commission has set forth the following guidelines to be used in determining whether an application is a "strike" application:

(1) The timing of the application;

(2) The economic and competitive benefit occurring from the application;

(3) The good faith of the applicant; and

(4) Questions concerning a frequency study.

2. Additionally, the Commission has emphasized in the *Grenco* order that FCC Form 301 warns that an application is not to be filed "for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict."

3. However, the Commission has emphasized that each circumstance should be examined since the "matter of purpose or motive cannot be scientifically defined." [16]

[16] The Commission pointed out that the motive or purpose—principal or incidental—*must be to obstruct or delay another application.* The Hearing Examiner has interpreted this to mean that a determination may be possible but no universally applicable set of determinants may now be sharply articulated to assure decisional finality in every instance.

4. By applying the facts of record in this proceeding to the Commission's guidelines, *supra*, it is concluded that the Sumiton application was filed for the principal purpose of obstructing or delaying the establishment of another standard broadcast facility in Cullman, Alabama. However, it is also concluded that the filing was planned and executed through the efforts of respondents Millar and Bullard without the knowledge of any of the principals of the Sumiton Broadcasting Company.

5. With respect to the timing of the Sumiton and Cullman applications, it is undisputed that the Sumiton application was prepared and filed after the Cullman application was returned by the Commission because of engineering deficiencies. Sumiton has argued without success (as the Broadcast Bureau points out) to the Review Board that before an application may be classified as a strike application, it is essential that an application with which it is mutually exclusive be pending. In rejecting this position, the Board has ruled that timing is only one aspect of the considerations to be made. (See 15 FCC 2d at 404, Ft. 6.) Moreover, the Board has also ruled that since Cullman's original application was filed prior to Sumiton's, it is important to know whether Millar and Bullard and/or Sumiton's principals knew, or had reason to know, that Cullman would refile.

6. The record evidence discloses that there were several ways in which Hudson Millar could have learned that the Cullman applicants intended to refile. It is apparent that the applicants spent considerable time interviewing various persons in the area in order to ascertain community needs, and that they had expressed to the persons interviewed an intent to refile. During the period after the return of the application, Katherine Knighten made regular trips to see one of Cullman's partners, Dan Mitchell, in connection with Mitchell's account at WKUL. In each visit, Miss Knighten asked Mitchell how the station was coming along. She was informed of Cullman's progress. Finally, it is uncontroverted that Leon Murphree, the other Cullman partner, discussed new transmitter sites with Arthur Bachmann, chief engineer at WKUL, almost immediately after the return of the Cullman application. The record evidence thus supports the conclusion that Millar and Bullard were aware of Cullman's intent to refile its application.

7. However, even if it could be believed that Millar did not know that Cullman intended to refile its application, it is clear that he made no effort to find out whether his actions would ultimately be in violation of Commission policy. On November 26, 1965, when informed that the Cullman application was returned, Millar specifically sought advice from his attorney as to whether his interest in the mutually exclusive Sumiton frequency on 1540 kHz would constitute a "strike" application. In response, Millar was told that although the application would be legal because the Cullman application had been returned, he nevertheless would run the risk of being accused of filing a strike application if it were refiled. However, rather than inquiring directly from Mitchell—a man whom he had known and dealt with on a business basis for years—as to whether the partners intended to refile, Millar instead went forward with the organization of the Sumiton applicant.

8. As an excuse for his conduct, Millar states, in effect, that such an inquiry would have been "too personal" a question. Nevertheless, both as a Commission licensee and one obviously aware of the potential dangers of his actions, it is clear that Millar's conduct was irresponsible even if viewed in its most favorable light. In truth, however, the entire set of events manifests a carefully planned and executed strike application. At the outset, it is clear that Millar felt threatened by the new application from the first moment he learned it had been filed. He not only studied the application for any possible irregularities, but also had his own station's engineer search for technical flaws in the field strength measurements. At the same time, Millar went to see local citizens in an attempt to have them "correct" favorable letters concerning the economic potential of the town which they had written on behalf of the new applicant. In the case of one person, Judge Hart, Millar's comments included a subtle hint that the man would be subpoenaed to Washington and embarrassed on the witness stand.[17] Finally, the record shows that Millar even threatened Mitchell directly with an expensive and drawn out hearing. Thus, there can be no doubt that from the beginning Millar's conduct manifests an intent to block the new Cullman application.

9. It is also obvious that Millar would have derived an economic benefit from a denial of the Cullman application. With a 1960 population of only 10,883, it is apparent that a grant of Cullman's application would have resulted in the establishment of a third AM outlet and a fourth aural outlet to this community. In addition, the record shows that Millar admitted to Wayne Sims that an application on the 1540 frequency in Sumiton, if approved, would block a similar facility in Cullman and thereby prevent another competitor from entering the market. Finally, by virtue of his conversation with both his counsel and Mitchell concerning the possibility of an economic injury protest to the Commission, Millar's conduct provides further indication of his awareness that another station in Cullman would mean additional, unwanted competition. Accordingly, it is concluded that Millar was indeed aware of the competitive benefits which would accrue to him by blocking the Cullman Music application, and that such was the motive behind his actions.

10. Numerous other facts of record support the conclusion that Millar and Bullard were intent on blocking a new facility in Cullman. First, prior to the return of the Cullman application, the facts show that Millar and Bullard contacted their consulting engineer for the purpose of finding out what frequencies were still available in Cullman. The two men apparently hoped to improve WKUL's facilities in an attempt to offset the anticipated economic effect which would have been caused by the entry of another AM station in the market. However, when this plan was discouraged by the engineer's report, it is clear that Millar was still left in what he considered an unfortunate situation. Thus, two alternatives were considered: a new facility in Birmingham or a new facility in Sumiton. For Birmingham, the

[17] Parenthetically, it should be noted that despite Millar's assertion to the contrary, the town of Cullman has grown in population.

consulting engineer was once again called upon to do a frequency review. For Sumiton, the two men studied a frequency search made by Bullard himself. It was at this time that they decided that Sumiton was too small to use for themselves, but that they could "advise" another group instead. The record does not reflect why no application was ever filed for Birmingham.

11. Although Millar and Bullard are professional "broadcast consultants," and although they decided not to apply for Sumiton because it was "too small," they were nevertheless willing to help foster the application through Wayne Sims *without a fee*. Indeed, Bullard himself asked for no fee until Ballenger himself raised the question when Bullard visited him at the lumber company about a month later. Moreover, even when the time came to collect the "fee," Bullard in effect took only token payment. By selling the ads on his advertising clocks for $40 instead of $39, it is clear that Bullard in effect sold his services for a total of $9. It is convincing to the Hearing Examiner and the Broadcast Bureau that Bullard's participation cannot be viewed as altruistic. Moreover, the absence of Bullard's name from the application is a further indication of his desire to conceal his participation in the preparation of the application. The Review Board specifically ruled that Bullard's assistance should have been disclosed in the Sumiton application.

12. Bullard and Millar did not limit themselves to a mere initial suggestion to Wayne Sims. On November 30, 1965, according to a memo in his files, Julius Cohen was asked by Millar to proceed with work on the Sumiton application.[18] In addition, shortly thereafter, in late December 1965, Bullard was to recommend Julius Cohen as consulting engineer to Freeman Ballenger, one of Sumiton's principals.[19] Thus, it is concluded that Millar and Bullard were instrumental in indirectly supervising the successful completion of the engineering aspects of the application by their own consulting engineer.

13. On the other hand, the evidence in this record contains no indication of bad faith or complicity on the part of the Sumiton principals with respect to the filing of the application. In this context, it is noted that the facts show that the applicant's principals had no knowledge whatsoever of Millar's efforts behind the scenes. Moreover, their innocence is essentially corroborated by the testimony of Wayne Sims, who stated that he had carried out Millar's express directions of keeping Millar's role quiet "in order to protect Millar's end of it" and thereby eventually collect payment which he thought was due him.[20] It is, therefore, concluded that the Sumiton applicants did not knowingly contribute to the efforts of Millar and Bullard's attempt to

[18] Cohen, in his oral testimony, denied that Millar asked him to proceed. However, in our view, this denial can be given no weight since almost four years had passed since the memo in question had been written. Moreover, the memo itself must be deemed the best evidence of the contents of that phone conversation.

[19] It is also obvious that Bullard's visit to Ballenger was more than mere coincidence. From his past encounters with Ballenger beginning in 1960, in which the two men had always discussed the "radio business," Bullard had every reason to believe that the topic of conversation would eventually turn to radio. He also had reason to know that Ballenger had already been contacted by Wayne Sims and later by J. L. Sartain.

[20] Sims attempted to tape record a conversation he had with Millar but the tape turned out to be a flop. Counsel for the intervenors call Sims' efforts "an attempt to entrap Hudson Millar." (Intervenors' Proposed Findings and Conclusions, p. 88.)

block a grant of the Cullman application. In addition, it is clear from the record as a whole that the Sumiton principals have diligently prosecuted their application without regard to the status of the Cullman application.

14. In adding the three issues requested by the Bureau in its petition to enlarge filed on August 13, 1969, the Board stated:

> In the Review Board's opinion, substantial questions have been raised. . . . No amendment disclosing Ballenger's withdrawal has been filed; *nor would such an amendment, in any event, avail to moot the requested forgery* and false representation issue. We are here dealing with a corporate applicant, and the conceded conduct of one of its officers and stockholders—C. F. Ballenger—must, at least for determining whether an issue is warranted, be considered to be that of the entity, Cf. *Eleven Ten Broadcasting*, 32 FCC 706 (1962). While the circumstances surrounding Ballenger's inadvertent error (if found to be true); Ballenger's voluntary withdrawal (if that is so); and the alleged lack of knowledge by either of the surviving principals may serve to mitigate Ballenger's action, these are matters which require further explanation. . . . (Emphasis added by the Broadcast Bureau in its proposed conclusions.)

15. The undisputed facts on this record reveal that an affidavit purportedly signed on August 3, 1968 by John Logan Fowler and filed with the Commission by Sumiton on August 8, 1968, was in actuality signed by Freeman Ballenger. Ballenger at that time was a principal of Sumiton, as well as the business partner of Fowler in a lumber company in Sumiton, Alabama.

16. Testimony given by Fowler establishes that he had no intention of permitting Ballenger to sign the affidavit in his absence. The testimony given by Paul Brown, Ballenger's employee at the lumber company, and Ballenger are intended to indicate that Fowler had "authorized" Ballenger to sign the affidavit because of the delay of Sumiton's counsel in bringing the affidavits in for Fowler's signature.

17. In the Broadcast Bureau's view the record as a whole lends weight to the accuracy of Fowler's testimony on the facts concerning the "forged" affidavit. In the first place, says the Bureau, even if it could be assumed that Fowler had "authorized" Ballenger to sign the affidavit, this would still not explain why Ballenger waited until shortly before a hearing session held months later to show for the first time the affidavit to Fowler. Thus, it is concluded that none of the testimony adduced by Sumiton under this issue serves to rebut the inference that Ballenger never intended for Fowler to see the affidavit until the scheduled hearing made this step imperative. Second, since the "forged" affidavit is notarized, it would appear that Ballenger somehow knowingly succeeded in getting a notarization on a patently false affidavit. Finally, it is apparent from the very face of the document that Ballenger never told the Commission that he was in any way "authorized" to act on behalf of his partner. Surely, if Ballenger had intended to deal with the Commission in an open and forthright manner, there would have been no need to resort to the conduct exhibited here. In the very least, the Commission must be assured by persons coming before it of their highest *bona fides*. Ballenger's conduct is a brazen affront to the Commission and its rules. Accordingly, we conclude that the error made by Ballenger cannot be deemed "inadvertent."

18. In addition, it is apparent that Ballenger's withdrawal was far from prompt. Notwithstanding the testimony that Ballenger was approached immediately after the forged affidavit came to the attention of the other principals, Ballenger waited until October 11, 1969 to accept the offer to resign and until the last week of November to surrender his stock. Moreover, Chapman's testimony that he did not find Ballenger's conduct improper except in a "technical" way reveals an ignorance of the high standard of conduct required of a potential licensee. It is therefore concluded that Sumiton has failed to mitigate the seriousness of Ballenger's conduct, and that it must be disqualified on this basis alone.

19. Similarly, Sumiton's failure to amend its application until December 3, 1970 to reflect the withdrawal of Fowler on April 18, 1969 and Ballenger on October 11, 1969 is not explained away by "money problems" and the time involved in obtaining a substitute shareholder. Clearly, even if this were true, the withdrawals could have been reported within thirty days. However, it is obvious that a motive existed for Sumiton's failure to report this information within the thirty days required by Section 1.65 of the Rules. As the Board correctly noted at 20 FCC 2d 672, both Fowler's withdrawal and Sartain's financial status (which the record shows to have been precarious) had a clear effect on the financial qualifications of the applicant because the withdrawal would have jeopardized the security terms of its bank letter. Moreover, these initial complications were compounded by the potentially disqualifying nature of Ballenger's conduct with respect to the "forged" affidavit. Obviously, Ballenger's resignation could only further jeopardize the application in terms of character qualification and financial qualifications. As a result, but for the fortuity of Fowler's sending a letter to the Commission explaining what had occurred, it is apparent that the Commission would never have learned of the financial and organizational problems which faced the applicant. The Bureau concluded that Sartain's financial status was a matter of concern to his fellow principals, but does not conclude that he was ever actually "forced out" of the applicant corporation. The endorsement of his stock in blank to Chapman did not constitute a resignation. In addition, it would appear that Sartain's services were indeed of value to the applicant since he was the only principal with any broadcasting experience or expertise.

20. Finally, to turn to the present financial qualifications of the applicant. Under its most recent amended financial showing, Sumiton will require $52,680 to meet estimated first year costs of construction and operation. To meet these needs, the applicant relies on a loan of $25,000 from the Walker County Bank and a loan from Dr. Posey in the amount of $40,000.

21. The letter from the vice-president of the Walker County Bank clearly sets forth the principal, interest, security, and terms of repayment of the bank loan. Accordingly, the applicant may be given credit for funds in the amount of $25,000 on the basis of the bank loan commitment.

22. Insofar as the stockholder loan from Dr. Posey is concerned, his balance sheet shows liquid assets of $21,550 in cash; $45,000 in U.S. Government securities; and $7,000 in cash surrender value of life insurance. He may thus be given credit for $73,500 (as of the close of the proceeding) in current liquid assets. Against these current liquid assets, Dr. Posey shows only $3,500 in current liabilities. Accordingly, it is concluded that Dr. Posey has sufficient liquid assets to lend $40,000 to Sumiton, and that the applicant may be found financially qualified.

23. On May 23, 1972 the Hearing Examiner reopened the record and granted a petition of Sumiton Broadcasting Co., Inc. to show by amendment the change in residence of a stockholder, Dr. Jerry C. Chapman. The record was reclosed the same day.

24. It is always trying upon the conscience of a substitute Hearing Examiner to take a "cold" record and, not having the privilege of confronting principals and witnesses. come to a fair conclusion that he can "live with." This is such a case and such a circumstance. Be that as it may, this Hearing Examiner is not able to conclude from all the facts and conclusions herein and of record that Sumiton deserves a grant in the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party to the proceeding, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Sumiton Broadcasting Co., Inc. for a construction permit for a standard broadcast station to operate on 1540 kHz in Sumiton, Alabama IS DENIED.

CHARLES J. FREDERICK,
Hearing Examiner,
Federal Communications Commission.

FCC 74-230

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of TELEPROMPTER FLORIDA CATV CORP., GREENACRES CITY, FLA. For Certificate of Compliance	CAC-1369 FL187

MEMORANDUM OPINION AND ORDER

(Adopted March 7, 1974; Released March 15, 1974)

BY THE COMMISSION:

1. On October 13, 1972, TelePrompTer Florida CATV Corporation filed an application for certificate of compliance to begin cable television service at Greenacres City, Florida,[1] a community located within the specified zone of the West Palm Beach smaller television market. The system proposes to offer its subscribers the following television broadcast signals:

WPBT (Educ., Channel 2) Miami, Florida.
WTHS-TV [2] (Educ., Channel 2) Miami, Florida.
WPTV (NBC, Channel 5) Palm Beach, Florida.
WTVJ (CBS, Channel 4) Miami, Florida.
WCKT (NBC, Channel 7) Miami, Florida.
WEAT-TV (ABC, Channel 12) West Palm Beach, Florida.
WPLG-TV (ABC, Channel 10) Miami, Florida.
WLTV (Ind., Channel 23) Miami, Florida.
WKID (Ind., Channel 51) Fort Lauderdale, Florida.

Carriage of these signals is consistent with Section 76.59 of the Commission's Rules, and the application is unopposed.

2. TelePrompTer acknowledges that its franchise, granted June 12, 1972, does not strictly comply with the franchise standards established in Section 76.31 of the Commission's Rules, and requests a waiver of that section until March 31, 1977. In support of its request, TelePrompTer offers three arguments: (a) the applications for certificates of compliance for six communities located near Greenacres City, filed with the instant application, have franchises with the same material provisions as the franchise for Greenacres City, and all of these franchises (granted prior to March 31, 1972) are substantially consistent with Section 76.31; (b) the franchise for Greenacres City is substantially consistent with Section 76.31 because: (1) a letter from the

[1] The city of Greenacres has a population of 1,731. TelePrompTer intends to have 27-channel capacity.
[2] WPBT and WTHS-TV operate on Channel 2 on a shared-time basis.

mayor of Greenacres City establishes that TelePrompTer's qualifications were considered in a full public proceeding affording due process; (2) construction will be completed within one year of obtaining all requisite authorizations; (3) the 30-year franchise period is immaterial since any waiver would only extend until March 31, 1977; (4) the initial rates as specified in the franchise have been approved and no changes may be effective until 30 days after being filed with the town clerk, while certain monthly service and installation charges may not be changed without the prior consent of the city council; (5) the franchise requires that the grantee maintain a local office, have a listed telephone, and make repairs promptly; and (6) the 5 percent franchise fee charged by the city is appropriate and will not interfere with federal regulatory goals. A letter from the mayor of Greenacres City is submitted which explains that operation of the cable system will require safety inspections and financial audits by the city and notes that rate increases will require council action; (c) finally, TelePrompTer states that it entered into binding contractual agreements prior to March 31, 1972, for comprehensive liability insurance, an indemnity bond, pole attachments, and equipment purchases.

3. In the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 210 (1972), we exempted from consistency with Section 76.31 until March 31, 1977, or until the franchise expired, cable television systems in operation prior to March 31, 1972. On *Reconsideration* (FCC 72–530, 36 FCC 2d 326, 366 (1972)), to alleviate unreasonable hardships, we modified the rule so that franchises granted prior to March 31, 1972, would be processed provided that at least substantial compliance with Section 76.31 was shown. We also provided that any system which made significant financial investments or entered into binding contractual agreements in reliance on an existing franchise granted prior to March 31, 1972, could petition for special relief. TelePrompTer's franchise was awarded on June 12, 1972. Accordingly, none of the investments or agreements could have been made in reliance on an existing franchise. Since the waiver requested is not, therefore, one contemplated by our Rules, and TelePrompTer has failed to establish that a waiver is justified on other grounds, it will be denied.[3] Apart from other Section 76.31 variations, we note that the showing offered to establish the reasonableness of the 5 percent franchise fee is not adequate. Pursuant to Section 76.31(b), the franchisee must show that the fee "will not interfere with the effectuation of federal regulatory goals" and the franchising authority must show that "it is appropriate in light of a planned local regulatory program." TelePrompTer has not offered any projection of income or estimate of the amount of this fee, nor does the letter from the mayor of Greenacres City disclose any unusual obligations the city has undertaken which might constitute a "planned regulatory program." See *WKBC Cablevision, Inc.*, FCC 74–94, —— FCC 2d —— (1974).

4. Because our denial of the application is based upon our conclusion that the submitted franchise does not achieve the required degree

[3] *See Lone Star Television Service, Inc.*, FCC 72–1108, 38 FCC 2d 551 (1972); *Verto Corp.*, FCC 72–1007, 38 FCC 2d 963 (1972); *TeleCable of Spartanburg, Inc.*, FCC 72–1006, 38 FCC 2d 76 (1972).

of conformity with Section 76.31, our action today will be without prejudice to its reconsideration in connection with the submission of an amended franchise that is consistent with Section 76.31. See *Community Television, Inc.*, FCC 73–1208, 43 FCC 2d 1090 (1973); *Leacom, Inc.*, FCC 72–292, 40 FCC 2d 129 *recons. granted*, FCC 73–412, 40 FCC 2d 693 (1973).

In view of the foregoing, the Commission finds that a grant of the subject application would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance (CAC–1369) filed October 13, 1972, by TelePrompTer Florida CATV Corporation, IS DENIED, subject to the further proceedings described in paragraph 4 above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-234

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606(b), TELEVISION TABLE OF ASSIGNMENTS, TV BROADCAST STATIONS. (MYRTLE BEACH, S.C.)	Docket No. 19810 RM-2153

REPORT AND ORDER

(Adopted March 7, 1974; Released March 12, 1974)

BY THE COMMISSION:

1. On September 6, 1973, the Commission adopted a Notice of Proposed Rule Making in the above-entitled matter (FCC 73-911, 38 Fed. Reg. 26008) proposing to amend the Television Table of Assignments contained in Section 73.606(b) of the Commission's Rules by assigning Channel 43 to Myrtle Beach, South Carolina as its first commercial television assignment. Comment and reply comment dates were designated as October 23 and November 1, 1973. These dates were extended to October 30 and November 8, 1973, respectively. The Notice was issued in response to a petition for rule making, RM-2153, by Greater Myrtle Beach Television Corporation (Myrtle Beach) which proposes to apply for a construction permit to operate a station on Channel 43 at Myrtle Beach if the channel is assigned.

2. Myrtle Beach and Platt Broadcasting Company, Inc. (Platt)[1] filed supporting comments. No comments in opposition were received. In the Notice it was pointed out that the various statistics cited by Myrtle Beach in its petition as to the growth of Myrtle Beach and other communities in the area (including Myrtle Beach Base and Surfside Beach Town) and various population divisions (the Myrtle Beach Division, Lois West Division, Lois South Division, and Lois East Division), and the abundance of other information submitted showing the tremendous growth of the Myrtle Beach area was sufficient enough indication of the need for an assignment for the Commission to propose making an assignment to Myrtle Beach. However, since channel assignments are made to a specific community, Myrtle Beach was requested to furnish data and information in its comments specifying the relationship of the various communities and population areas to the city of Myrtle Beach, the length of the tourist season, and the breakdown of statistics between the city of Myrtle Beach and county district of Myrtle Beach. Both Myrtle Beach and Platt have responded

[1] Platt is a South Carolina corporation which has been formed for the purpose of obtaining authorizations to construct and operate a UHF television broadcast station at Myrtle Beach, South Carolina. The sole stockholders of the company are Dr. and Mrs. V. F. Platt, Jr.

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with the necessary exhibits (maps and population tables) in answer to the request of the Notice and thereby leave no doubt as to the merits of an assignment to Myrtle Beach. In addition both Myrtle Beach and Platt state that applications will be filed for authority to construct and operate a station if an assignment is made.

3. Myrtle Beach is located in an area where unassigned but available UHF television broadcast channels are not considered scarce. Of the 14 channels available for assignment to Myrtle Beach, Channel 43 appears to be the most efficient assignment. Its assignment meets all minimum mileage separation requirements of the Commission's Rules, requires no channel juggling of existing assignments in the Table, and has the least adverse preclusionary effect on possible channel assignments to other cities within the assignment area.

4. In view of the foregoing, the Commission believes that the public interest would be served by assigning Channel 43 to Myrtle Beach, South Carolina. Accordingly, pursuant to the authority contained in Sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended, IT IS ORDERED, That, effective April 19, 1974, the Table of Assignments in Section 73.606(b) of the Commission's Rules is amended insofar as the city listed below is concerned to read as follows:

City:	*Channel No.*
Myrtle Beach, S.C.	43

5. IT IS FURTHER ORDERED, That this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-235

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENTS OF SECTION 73.606(b), TABLE OF ASSIGNMENTS, TELEVISION BROADCAST STATIONS. (WHEELING, W. VA.)	Docket No. 19826 RM-2214

REPORT AND ORDER

(Adopted March 7, 1974; Released March 12, 1974)

BY THE COMMISSION:

1. The Commission here considers the Notice of Proposed Rule Making, adopted September 11, 1973 (FCC 73-953), proposing amendment of the Television Table of Assignments (§ 73.606(b) of the Commission's Rules and Regulations) to reserve Channel 41 at Wheeling, West Virginia, for noncommercial educational use. The only comments filed are those of the petitioner West Virginia Board of Regents, which as pertinent here is the licensee of noncommercial educational television broadcast Station WWVU-TV, Morgantown, West Virginia, and translator Station W41AA, Channel 41 at Wheeling.

2. The issues are as stated in the Notice. Wheeling, population 48,188, has three television assignments: Channels 7, 14, and 41; Channel 7 is occupied by Station WTRF-TV; Channel 14 is unavailable for use pending further action in Docket No. 18261 which concerns the use of that channel for the land mobile service; and Channel 41 is licensed to the West Virginia Board of Regents as Translator Station W41AA.

3. The West Virginia Board of Regents more or less reiterates the information previously stated in its petition and briefly outlined in our Notice. As part of its program to provide a permanent state-wide system of educational television for West Virginia, the Board of Regents together with the West Virginia Educational Broadcasting Authority [1] is constructing a seven station translator network throughout the state for the purpose of extending the programming of Station WWVU-TV to areas unserved in West Virginia by educational television. WWVU-TV broadcasts 77 hours of weekly programming including a full weekday school service, programming from the Public Broadcasting Service, the Eastern Educational Television Network, and the Public Television Library. As concerns the instant proposal, the translator network would extend educational programming (which as of the date of the petition served approximately 85% of the state's population) to ten additional counties in the Northern Panhandle. Local commercial television service at Wheeling is provided by Wheeling's Station

[1] The latter is the licensee of noncommercial educational Station WMUL-TV, Channel *33, Huntington, and WSWP-TV, Channel *9, Grandview, West Virginia.

WTRF–TV as well as many out-of-state stations including Stations WSRB–TV, Channel 9, Steubenville, Ohio, and stations at Pittsburgh, Pennsylvania, and Youngstown, Ohio. Station W41AA on Channel 41 provides educational noncommercial service. The Board of Regents as part of its comments includes letters of support from sixteen educational authorities and community leaders.

4. As stated in the Notice, the purpose of the proceeding is that the Board of Regents wants to assure itself that Channel 41 is reserved for noncommercial use with the possibility of the translator being activated as a broadcast station. In the circumstances, it would appear that the public interest, convenience, and necessity would be served by reserving Channel 41 at Wheeling, West Virginia, for noncommercial educational use.

5. In view of the foregoing and pursuant to authority found in §§ 4(i), 303 (g) and (r) and 307(b) of the Communications Act of 1934, as amended, § 73.606(b) of the Commission's Rules and Regulations, the Television Table of Assignments, as concerns Wheeling, West Virginia, IS AMENDED, effective April 19, 1974, as follows:

City:	*Channel No.*
Wheeling, W. Va	7,[1] 14, *41

[1] Following the decision in docket No. 18261, channels so indicated will not be available for television use until further action by the Commission.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-225

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of VOICE OF DIXIE, INC., BIRMINGHAM, ALA.	Docket No. 18664 File No. BPH-6449
FIRST SECURITY & EXCHANGE CO., BIRMINGHAM, ALA. For Construction Permits	Docket No. 18666 File No. BPH-6610

APPEARANCES

S. White Rhyne, Jr., and *Eugene F. Mullin* on behalf of Voice of Dixie, Inc.; *Morton L. Berfield* and *Lewis I. Cohen*, on behalf of First Security and Exchange Company; and *Thomas B. Fitzpatrick*, *Earl C. Walck* and *William D. Silva*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted March 7, 1974; Released March 15, 1974)

BY THE COMMISSION:

1. This proceeding involves mutually exclusive applications for a new FM station at Birmingham, Alabama, filed by Voice of Dixie, Inc. (Voice) and First Security and Exchange Company (First Security). The applications were designated for hearing in an order, FCC 69-980, released September 17, 1969, on financial, *Suburban*, and standard comparative issues. In an Initial Decision, FCC 71D-63, 41 FCC 2d 560, released September 17, 1971, Administrative Law Judge Denniston resolved the financial and *Suburban* issues in favor of each of the applicants but recommended the grant of Voice's application on the basis of the comparative criteria. Both applicants filed exceptions with the Review Board, with Voice arguing that the Administrative Law Judge erred in finding that First Security had made a satisfactory *Suburban* showing because it failed to comply with the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971). The Board rejected Voice's arguments, reversed the Administrative Law Judge on the basis of the comparative issue, and granted First Security's application, FCC 73R-201, 41 FCC 2d 550, released May 31, 1973. Voice then filed an application for review which was opposed by both First Security and the Broadcast Bureau. In an Order, FCC 73-967, released September 24, 1973, and modified by order, FCC 73M-1159, released October 5, 1973, we granted review, scheduling this matter for oral argument and briefing. We now have under consideration briefs filed October 23, 1973, by Voice and First Security, together

with replies filed on November 9, 1973, by Voice, First Security, and the Broadcast Bureau, a letter dated January 7, 1974, from Voice, a letter in response dated January 22, 1974, from First Security, and a further letter dated January 24, 1974, from Voice. Oral argument was heard by the Commission, *en banc*, on November 26, 1973.

2. Before we can address ourselves to the comparative considerations, we must first resolve the arguments concerning the adequacy of First Security's *Suburban* showing. It is well established that an applicant will be disqualified if it fails to ascertain the needs of its proposed service area in an adequate manner. *Suburban Broadcasters* 30 FCC 1021 (1961), affirmed *sub nom.*, *Henry* v. *F.C.C.*, 302 F. 2d 191, 23 RR 2016 (1962). We are cognizant of the fact that First Security's ascertainment efforts were deemed to be sufficient by both the Administrative Law Judge and the Review Board. Voice, however, alleges that there are numerous serious deficiencies in First Security's ascertainment efforts. First Security does not rebut the allegations, but argues that, if we look at its entire survey, we will find that it substantially complied with the requirements of the *Primer*. The Bureau, while conceding the existence of deficiencies in First Security's survey, argues that those deficiencies are not sufficient to deny First Security's application. The *Primer*, *supra*, was adopted after the commencement of this proceeding. It set forth specific guidelines for ascertaining the needs of a proposed service area, and, after the hearing concluded, the record was held open in order to afford the parties an opportunity to bring their ascertainment efforts into compliance with it. Our review of the record indicates that First Security failed to do so, and that it is not qualified to be a Commission licensee.

3. The Initial Decision credited First Security's survey with 99 interviews with community leaders. However, the Review Board found that 21 of the interviews were not conducted by principals, management level employees, or prospective management level employees, and it refused to consider those interviews as part of First Community's survey. *Primer*, Question and Answer 11 (a), 27 FCC 2d at 683; *Childress Broadcasting Corp.*, 37 FCC 2d 766 (Rev. Bd. 1972). The survey was conducted by Mr. Neal Miller, the proposed station manager, and Mr. Stewart-Magee, who is a vice-president and director of First Security [1], with assistance from Daniel Walker, H. R. Turpin, and Mrs. Stewart-Magee. Seven of the interviews were conducted by Mr. Walker, who is not a principal or employee of First Security, although there has been some discussion that he would fill the position of "account-sales" if First Security's application is granted. Seven interviews were conducted by H. R. Turpin, who was not affiliated with First Security but was employed by Mr. Stewart-Magee in a business venture not related to the applicant. An additional seven interviews were conducted by Mrs. Stewart-Magee, who also has no official position with First Security. Although the interviews were not conducted in accordance with the *Primer*, First Security argues that, since the interviews were con-

[1] Although Mr. Stewart-Magee is an officer and director of First Security, he has no ownership interest in the company, which is a personal investment corporation owned entirely by Mr. Edward P. Ellis, an Atlanta, Georgia, attorney, except for 20% of its stock, which Mr. Ellis holds in trust for a minor daughter.

ducted in the presence of Mr. Stewart-Magee, no questions should be raised about the results, validity or integrity of the interviews. In view of the facts that the results were studied by Mr. Ellis, First Security's principal, and reviewed with Mr. Stewart-Magee, First Security also argues that it was not necessary to reinterview those leaders who had been improperly interviewed. These arguments, however, overlook the intent and significance of the *Primer*.

4. Question and Answer 11(a) of the *Primer* specifically requires that interviews with community leaders be conducted by principals, management level employees, or prospective management level employees. 27 FCC 2d at 683. In requiring that consultations with community leaders be conducted by principals or management level employees, we were seeking to establish a dialogue between the principals of the proposed station and the community and to prevent any loss of information resulting from the filtering or summarizing of information gathered by non-management level employees. We stated that the required procedures would help to establish contacts with the station in the interviewees' minds and identify the persons to be contacted if further discussions of community needs are warranted. 27 FCC 2d at 664. The manner in which First Security delegated the conduct of its survey to non-management employees and even non-employees worked to defeat these aims of the *Primer*, and the Board properly refused to consider the interviews conducted in this manner. *Childress Broadcasting Corp., supra.*

5. While the Board deleted the 21 interviews from its consideration, it failed to consider the effect of those deletions on the validity of First Security's survey. The deleted interviews included all consultations with labor leaders.[2] The record shows that Birmingham is a heavily industrialized city, economically dependent on the iron and steel industry. In the *Primer* we addressed ourselves to applications from industrialized centers, specifically asserting that "we would expect consultations with labor leaders in cities with industries that are typically unionized." 27 FCC 2d at 661. We went on to say that where there are a substantial number of unions in a community "more than one union, or a group consisting of more than one union, such as a Labor Council," should be included in the survey. 27 FCC 2d at 662. The seriousness which we attach to such an omission is set forth in Answer 16 in the *Primer*, wherein we stated that "the omission of consultations with leaders of a significant interest group would make the applicant's showing defective, since those consulted would not reflect the composition of the community." 27 FCC 2d at 684. Answer 16 is particularly significant because it represents a conscious tightening of the standards proposed in the *Interim Primer*, where we stated that such an omission would only leave the ascertainment process "subject to question." 20 FCC 2d 881 at 883 (1969). It is thus clear that First Security's failure

[2] Mr. H. D. Turpin interviewed all the labor leaders included in First Security's survey. Although First Security argues that the interviews were conducted in the presence of Mr. Stewart-Magee, they were still not conducted in an acceptable manner. In any event, counsel for First Security has conceded that it could be inferred that Mr. Turpin conducted the interviews by telephone, making it impossible for Mr. Stewart-Magee to participate in the dialogue with the persons being interviewed.

to include in its survey properly conducted interviews with representatives of organized labor, makes the survey defective.[3]

6. First Security's survey also ignored entirely the representatives of Birmingham's two largest employers, the iron and steel industry and the University of Alabama educational-medical complex. Although the Review Board acknowledged these omissions, it found that First Security "did consult with community leaders who are generally representative of employers in the community." This finding, however, will not survive careful analysis. While First Security did interview several bankers, contractors, small businessmen and other employers, our review finds no one with a position which could be considered equivalent to that of a management level employee in the iron and steel industry which is the largest industry in Birmingham, or of the University of Alabama educational-medical complex which has a budget of $35 million. While we do not specifically require an applicant to survey all employers or even all major employers in a given community, we cannot understand how First Security's survey was "generally representative" of employers and large industry in the face of these significant omissions, particularly when there is no showing that representatives of other significant similar, large employers or dominant industries were surveyed. This omission further weakens First Security's already defective survey.

7. The survey was also deficient in that it failed to give adequate attention to the City of Bessemer. Bessemer is the second largest city located entirely within First Security's proposed service area. The elimination of the 21 interviews deleted the only interview with a community leader from the City of Bessemer. Two other persons from Bessemer were interviewed. One was a receptionist at a neighborhood Youth Corps Center, and the record is devoid of any evidence attributing leadership responsibility to her. The other was a woman who is President of the Bessemer Association of Women's Club who discussed the problems of low income minority youth in Birmingham. Thus, First Security failed to ascertain the needs and special interests of Bessemer as required by the *Primer*, 27 FCC 2d at 659. Similarly it failed to survey anyone from either the city of Tuscaloosa or from Tuscaloosa County. Tuscaloosa County is the only urban county adjacent to Jefferson County, and the city of Tuscaloosa, which is located 50 miles from First Security's proposed transmitter site, is the second largest city it would serve. While these later omissions further weaken First Security's survey, they are mitigated by the fact that only parts of the City of Tuscaloosa and Tuscaloosa County would be within First Security's proposed service area.

8. First Security's survey of the general public was also deficient. Here again, First Security chose to ignore the clear instructions of the *Primer*. Although the *Primer* specifically requires that the survey of the general public be conducted by principals, employees, prospective employees, or a research organization, Answer 11(b), 27 FCC 2d at 683, it was conducted by Mr. and Mrs. Stewart-Magee. Since Mrs. Stewart-Magee does not fit within any of the authorized categories,

[3] In view of the unequivocal language in Answer 16 of the *Primer*, we find no basis or reason to adopt First Security's contention that it has substantially complied with our requirements.

only those portions of the survey conducted by Mr. Stewart-Magee may be considered. However, First Security failed to show the extent of his participation in the survey of the general public, so the entire survey must be rejected.

9. This is not an instance where an applicant merely failed to adhere to certain formalistic requirements of the rules. We have given First Security's ascertainment efforts our careful attention, and found that not only were its efforts inadequate, but that it completely disregarded established Commission policy. The *Primer* is unequivocal, and it gave First Security notice of what it was expected to do with respect to ascertaining community needs. First Security failed to heed the explicit instructions of the *Primer* in the face of our longstanding and consistent policy of considering such a failure to ascertain the needs of a proposed service area properly to be a disqualifying factor, *Suburban Broadcasters, supra.*, and knowing that the record was kept open in order to permit it to bring its survey into compliance with the *Primer*. Under these circumstances we are constrained to conclude that First Security's suburban showing is inadequate and that it is not qualified to be a Commission licensee.

10. The Board favored First Security on the basis of the comparative criteria. However, in light of First Security's disqualification, there is no need for us to consider the comparative issue. Moreover, since both the Administrative Law Judge and the Review Board found that Voice is qualified to be a licensee, and no exception has been filed to those findings, its application will be granted. However, on March 1, 1973, the Birmingham Chapter of the Human Relations Council of Alabama (HRC) filed a petition to deny Voice's application for renewal of its license for standard broadcast station WVOK, Birmingham, Alabama. The allegations in HRC's petition, if not refuted, would obviously affect Voice's basic qualifications to be a licensee. Although those questions were not raised in this proceeding, we are taking notice of the HRC petition, and our grant of Voice's application will be subject to whatever action may be appropriate upon consideration of the questions raised by HRC concerning Voice's pending application for renewal of its license for station WVOK. In this connection, we are instructing the Broadcast Bureau to expedite the consideration of the questions raised by HRC's petition in order to resolve promptly the questions respecting Voice's basic qualifications to be a Commission licensee.

11. Accordingly, IT IS ORDERED, That the application of Voice of Dixie, Inc., (File No. BPH–6449), IS GRANTED, subject to the resolution of the questions raised by a Petition to Deny Voice of Dixie's, Inc.'s application for renewal of its license for standard broadcast station WVOK, filed March 1, 1973, by the Birmingham Chapter of the Human Relations Council of Alabama; and

12. IT IS FURTHER ORDERED, That the application of First Security and Exchange Company (File No. BPH–6610), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-237

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF W & W BROADCASTING CO., INC., LICENSEE OF RADIO STATION WTIK, DURHAM, N.C.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted March 7, 1974; Released March 13, 1974)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated April 18, 1973 (mailed April 19, 1973) addressed to W & W Broadcasting Company, Incorporated, the licensee of Radio Station WTIK, Durham, North Carolina, and (2) the licensee's response thereto dated May 10, 1973.

2. The Notice of Apparent Liability for forfeiture in the amount of two thousand dollars ($2,000) was issued for willful or repeated violation of Section 73.52(a) of the Commission's Rules for operation of the station during nighttime hours with power [1] greater than five per cent above the licensed power and Section 73.114(a)(5) of the Commission's Rules for failure to make entries in the maintenance log indicating daily base current readings. The overpower operation as set forth in the Notice of Apparent Liability was as follows:

Date	Time	Power output (watts)	Percent overpower
Apr. 19, 1972	9:30 p.m. to 10:30 p.m.	1064	6.4
21, 1972	10 p.m. to 10:30 p.m.	1064	6.4
22, 1972	9:30 p.m. to 10:30 p.m.	1389	38.9
23, 1972	12 midnight	1337	33.7
26, 1972	9 p.m. to 12 a.m.	1064	6.4
27, 1972	7:30 p.m.	1087	8.7
	11:30 p.m. to 12 a.m.	1064	6.4
28, 1972	12 midnight to 12:30 a.m.	1064	6.4
30, 1972	8 p.m. to 12 a.m.	1285	28.5
May 5, 1972	8:30 p.m. to 9:30 p.m.	1064	6.4
9, 1972	9 p.m. to 12 a.m.	1064	6.4
10, 1972	8:30 p.m. to 12 a.m.	1064	6.4
11, 1972	12 midnight	1087	8.7
12, 1972	8:33 p.m. to 9:33 p.m.	1087	8.7
14, 1972	8:30 p.m. to 12 a.m.	1389	38.9
16, 1972	8:30 p.m. to 12 a.m.	1087	8.7
24, 1972	9:30	1087	8.7
29, 1972	12 midnight	1064	6.4
30, 1972	8:30 p.m. to 10:30 p.m.	1064	6.4

[1] Station WTIK is authorized to operate with a power of 1,000 watts during nighttime hours.

In addition, the Notice of Apparent Liability set forth the dates and directional patterns for which there were no entries of daily base current readings in the maintenance log, as follows:

Apr. 7, 1972	Nighttime pattern.
Apr. 9, 1972	Daytime and nighttime patterns.
Apr. 10, 1972	Daytime pattern.
Apr. 21, 1972	Do.
Apr. 22, 1972	Do.
Apr. 23, 1972	Daytime and nighttime patterns.
Apr. 29, 1972	Daytime pattern.
Apr. 30, 1972	Nighttime pattern.
May 1, 1972	Do.
May 5, 1972	Do.
May 7, 1972	Daytime and nighttime patterns.
May 9, 1972	Nighttime pattern.
May 14, 1972	Daytime and nighttime patterns.
May 18, 1972	Nighttime pattern.
May 21, 1972	Daytime and nighttime patterns.
June 4, 1972	Do.

3. In response to the Notice of Apparent Liability, licensee states:

> We do not deny there was a violation of the station operating with more than 5% above the licensed nighttime power. The violations were committed by licensed First Class Operators while our auxiliary transmitter was being used. The instructions are posted on the transmitter. These qualified operators should have made the corrections or notified our Chief Engineer of an excessive power output.
>
> We are aware that these First Class Engineers are not qualified for maintenance but we do feel they could adjust the meters to the licensed power where instructions are posted on the transmitter in large letters.
>
> Our Chief Engineer states that he did not have a reason to check the logs because the three operators in question have the same license he has.

Further, the licensee states that new rules of operation provide that the chief engineer will check all readings and technical operations and that the Vice-President of the licensee corporation will receive a weekly report on all engineering data from the station. The licensee requests that it be relieved of liability or that the amount of forfeiture be reduced.

4. We find that the licensee repeatedly violated Section 73.52(a) of the Commission's Rules by operating with unauthorized power, on dates, and at times, all as set forth above, and repeatedly violated Section 73.114(a)(5) of the Rules during the period from April 19, 1972 through June 4, 1972 as set forth above. Licensees are responsible for acts or omissions of their employees. *Eleven Ten Broadcasting Corp.*, 32 FCC 706 (1962). Licensees will not be excused from liability because of negligence or oversight by the station staff. *Empire Broadcasting Corp.*, 25 FCC 2d 68 (1970). Having found that the violations were repeated, it is unnecessary that we make any additional finding as to willfulness. *Paul A. Stewart*, 45 FCC 773 (1963). Considering all the circumstances in this case, we are not persuaded to remit or mitigate the forfeiture.

5. In view of the foregoing, IT IS ORDERED, That W & W Broadcasting Company, Incorporated, the licensee of Radio Station WTIK, Durham, North Carolina, FORFEIT to the United States the sum of two thousand dollars ($2,000) for repeated violations of Sections 73.52(a) and 73.114(a)(5) of the Commission's Rules. Payment of this forfeiture may be made by mailing to the Commission a check, or other similar instrument, drawn payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-274

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF WYTI, INC., RADIO STATION WYTI, ROCKY MOUNT, VA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1974; Released March 18, 1974)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated April 25, 1973 (mailed April 27, 1973) issued to WYTI, Inc., licensee of Radio Station WYTI, Rocky Mount, Virginia and (2) the licensee's reply thereto dated May 17, 1973.

2. Station WYTI is licensed to operate with power of one kilowatt daytime only. The Notice of Apparent Liability for forfeiture in this proceeding in the amount of one thousand dollars ($1,000) was issued for willful or repeated violation of Section 73.52(a) of the Commission's Rules in that the station was operated with power in excess of that authorized during the full broadcast day on dates and with power as follows:

Dates (1972)	Power (watts)	Overlicensed power (percentage)
Apr. 24, May 31	1145	14.5
June 1	1195	14.5
June 2	1195	19.5
June 3-10	1145	14.5
June 11	1195	19.5
June 12	1145	14.5
June 13	1170	17.0

3. Responding to the Notice of Apparent Liability for the licensee, the President, general manager, and 100 percent stockholder of the licensee states that at the time of the violations he was an inexperienced station operator (having taken over operation of the station by assignment of license on January 1, 1971 approximately 16 months before the violations commenced), that he failed to check the license to determine the correct antenna current, and that he operated with the same antenna current used by his predecessor as indicated in the operating logs dating back to May 5, 1970. He further states that he was aware that the predecessor's license had been renewed "with no

apparent problems" and that the last inspection of the station was made in 1969. The licensee states that corrective action was taken immediately upon receiving the citation, that the violations were not willful and requests "suspension" or reduction of forfeiture.

4. We find that the licensee repeatedly violated Section 73.52(a) of the Rules during the period April 27, 1972 through June 13, 1972. Having found that the violations were repeated it is unnecessary that we make any additional finding as to willfulness. *Paul A. Stewart*, 45 FCC 773 (1963). Licensees will not be relieved of liability because of an oversight or failure to be aware of requirements. *Empire Broadcasting Corp.*, 25 FCC 2d 68 (1970). Further, a licensee will not be relieved of liability for violations which occurred because it continued a practice of a former licensee. *KMIN, Inc.*, 43 FCC 2d 566 (1973). Also, licensees will not be relieved of liability because they took prompt corrective action. *Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966). Considering the licensee's response and all the circumstances in this case, we are not persuaded to remit or mitigate the forfeiture.

5. In view of the foregoing, IT IS ORDERED, That WYTI, Inc., licensee of Radio Station WYTI, Rocky Mount, Virginia, FORFEIT to the United States the sum of one thousand dollars ($1,000) for repeated violation of Section 73.52(a) of the Commission's Rules. Payment of this forfeiture may be made by mailing to the Commission a check, or other similar instrument, drawn payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for remission or mitigation of forfeiture may be filed within thirty days of the date of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*